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To Be Let Alone: Florida's Proposed Right of Privacy

Gerald B. Cope, Jr.

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TO BE LET ALONE:
FLORIDA'S PROPOSED RIGHT OF PRIVACY

GERALD B. COPE, JR.

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TO BE LET ALONE: FLORIDA'S PROPOSED RIGHT OF PRIVACY

GERALD B. COPE, JR.*

I. INTRODUCTION

On November 7, 1978, Florida citizens will vote on a proposed revision of the state constitution. One of the most significant—and controversial—proposals in the omnibus revision measure is a new right of privacy. This simple but much-debated provision declares the right of each individual “to be let alone and free from governmental intrusion.” In addition, closely related sections set forth the relationship between the right of privacy and the “right to know.”

Inclusion of the right of privacy must be considered one of the major recommendations by the 1978 Constitution Revision Commission. Ratification would place Florida among the national leaders in an emerging trend to protect individual privacy. Ten states now include a right of privacy in some form in their constitutions, but only three have adopted privacy measures like those in the Florida proposal. Florida could become the fourth state—after Alaska, California, and Montana—to adopt a strong, freestanding right of privacy as a separate section of the state constitution.

This article was written in order to explore the newly drafted right “to be let alone”: Florida’s proposed right of privacy. It is designed to review in addition the several other privacy-related sections recommended by the 1978 Constitution Revision Commission. The article is a sequel to an earlier paper on the right of privacy, also published in this review. That paper was addressed primarily to the Constitution Revision Commission and urged it to add a new section to the declaration of rights setting forth a right of privacy for every Floridian.¹

The thesis of the earlier paper was that the states have a crucial role to play in protecting privacy. It reviewed the degrees of protection afforded the right of privacy by the federal and state constitutions. The paper demonstrated how, for a variety of reasons, the right of privacy in the Federal Constitution is inadequate. It argued

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1. Note, *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 FLA. ST. U.L. REV. 631 (1977) [hereinafter cited as *Toward a Right of Privacy*].

that the right to be let alone will be protected in a meaningful way only if the states choose to act. Reviewing the innovative steps taken in several states in the past decade, the author recommended a "package" of constitutional measures to confer strong protection on the right of individual privacy.

The members of the Constitution Revision Commission were, if anything, ahead of the author in their thinking about privacy. In his remarks to the commission's opening session, then Chief Justice Ben Overton called for action on the subject.² Commission Chairman Talbot "Sandy" D'Alemberte created a Committee on Ethics, Privacy and Elections, recognizing that the individual right to privacy and the public "right to know" are potentially in conflict. It was essential that a single committee explore the interrelationship. The members and staff of the Ethics, Privacy and Elections Committee developed a privacy package which is among the strongest and most comprehensive in the nation. This package was adopted with modifications by the commission.

Despite broad support for the proposal in the commission, there have been suggestions that a constitutional right of privacy could have drastic unintended consequences. The most far-reaching questions involved the basic functions of government. One commissioner expressed the fear that the right of privacy could block the use of electronic surveillance in organized crime investigations, while another suggested that the privacy right could undermine the police and taxing powers of the state and limit the use of discovery in civil litigation.³ Other persistent questions were whether a constitutional privacy right could be used to limit "sunshine" legislation designed to require disclosure of lobbying or other political activity; whether certain public records, like government employee personnel files, must be made confidential; whether possession of marijuana in the home would be made legal; and whether state laws regulating consensual sexual conduct between adults would be invalidated.⁴

The purpose of this article is to analyze the commission's privacy proposals and draw conclusions about what is—and is not—likely to happen if those proposals become part of the Florida Constitution. Fortunately, this can be more than a matter of guesswork.

2. Address by Chief Justice Ben F. Overton to the Constitution Revision Commission (July 6, 1977).

3. 2 Transcript of Fla. C.R.C. proceedings 39-42 (Jan. 9, 1978) [hereinafter cited as January 9, 1978 Transcript]; Transcript of Fla. C.R.C. proceedings 10-16 (Mar. 7, 1978) [hereinafter cited as March 7, 1978 Transcript].

4. Miami News, Feb. 2, 1978, § A, at 15, cols. 2-4.

Other states have preceded Florida on this path, and their courts have already faced some of the issues debated here. The proceedings of the Florida Constitution Revision Commission provide insight into the drafters' intent. Existing principles of Florida constitutional and privacy law yield some clues to the course Florida courts may take in the interpretation of a new constitutional right.

Last year the Federal Privacy Protection Study Commission filed its report. In reviewing California's first four years' experience with its 1972 constitutional right of privacy, the commission noted, "Perhaps most significantly, the California constitutional amendment, the court decisions predicated on it and the statutes that have flowed from them do not appear to have levied an undue burden on State government or private organizations."⁵ In the sections that follow, this article will examine whether the proposed right of privacy, if adopted, would be a boon or a burden for the Florida citizenry.

II. THE COMMISSION PROPOSALS

The Constitution Revision Commission's privacy proposals fall into three groups. First, and most important, is the suggested addition of a freestanding right of privacy to the declaration of rights. Proposed article I, section 23, would read as follows:

SECTION 23. Right of privacy.—Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein.⁶

Second, the commission proposes to add the word "privacy" to four related sections of the constitution. These sections are designed to describe how the balance is to be struck between the right of privacy and the right to know. Article I would contain two new sections, to read:

SECTION 24. Public records.—No person shall be denied the right to examine any public record made or received in connection with the public business by any nonjudicial public officer or employee in the state or by persons acting on the officer's or employee's behalf. The legislature may exempt records by general law

5. PRIVACY PROTECTION STUDY COMMISSION, *PRIVACY LAW IN THE STATES* i (1977) (preface) [hereinafter cited as *PRIVACY LAW IN THE STATES*]. The Commission was created by the Privacy Act of 1974, Pub. L. No. 93-579, § 5, 88 Stat. 1896, reproduced in comment to 5 U.S.C. § 552a (Supp. V 1975).

6. Fla. C.R.C., Rev. Fla. Const. art. I, § 23 (May 11, 1978) [hereinafter cited as Rev. Fla. Const.].

when it is essential to accomplish overriding governmental purposes or to protect privacy interests.

Schedule to Article I, Section 24.—This section shall become effective June 1, 1979.

SECTION 25. Open meetings.—No person shall be denied access to any meeting at which official acts are to be taken by any nonjudicial collegial public body in the state or by persons acting together on behalf of such a public body. The legislature may exempt meetings by general law when it is essential to accomplish overriding governmental purposes or to protect privacy interests.⁷

For article V, similar language is proposed.⁸ Section 1 applies to the courts:

SECTION 1. Courts.— . . . All judicial hearings and records and all proceedings and records of judicial agencies except grand and petit juries shall be open and accessible to the people. When it is essential to accomplish overriding governmental purposes or to protect privacy interests, the supreme court by rule or the legislature by general law may exempt hearings, proceedings and records from this section.⁹

Judicial nominating commissions are dealt with correspondingly:

SECTION 11. Vacancies.—

. . . .
 . . . (c) . . . Uniform rules of procedure for the judicial nominating commissions shall be prescribed by the supreme court. All proceedings and records of the judicial nominating commissions shall be open and accessible to the public. The supreme court may by rule exempt portions of the proceedings and records from this provision when it is essential to accomplish overriding governmental purposes or to protect privacy interests.¹⁰

Third, the proposed constitution would carry forward unchanged the present text of article I, section 12, which protects "private communications" from unreasonable searches and seizures.

7. *Id.* §§ 24-25.

8. The proposed constitution carries forward intact the existing confidentiality provisions of art. V, § 12(d), relating to the Judicial Qualifications Commission. Commission proceedings are confidential until there is a finding of probable cause and filing of charges, after which all further proceedings are public. Unlike §§ 1 and 11, § 12(d) is not framed in terms of "privacy interests" and "overriding governmental purposes."

9. Rev. Fla. Const., *supra* note 6, art. V, § 1.

10. *Id.* § 11.

SECTION 12. Searches and seizures.—The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. Articles or information obtained in violation of this right shall not be admissible in evidence.

All these proposals will be presented to the voters in November, 1978, as part of the main constitutional document. None of the sections is among the seven controversial items isolated for separate voting.

III. THE AMERICAN LAW OF PRIVACY¹¹

Privacy is a concept for which there is no generally accepted definition. Privacy may be visualized as a physical and psychological zone within which an individual has the right to be free from intrusion or coercion, whether by the government or by the society at large.

The modern concept of privacy has evolved during the past century. The right "to be let alone" was first described by Thomas M. Cooley in the 1880 edition of his *Treatise on the Law of Torts*.¹² In 1886, in *Boyd v. United States*, the Supreme Court noted for the first time that the Constitution, through the fourth and fifth amendments, protects "the privacies of life."¹³ In 1889, the newly admitted State of Washington adopted a constitution which protected each person's "private affairs," though that language was ultimately given a very restricted meaning.¹⁴ In 1890, Samuel Warren and Louis Brandeis wrote a famous law review article entitled *The Right to Privacy*,¹⁵ which gave birth to a new tort, the invasion of privacy.

11. *Toward a Right of Privacy*, *supra* note 1, explored in detail the development of the right of privacy. That note may be helpful to the reader, as it is the predicate for the discussion that follows. Space allows only a few words of overview here.

12. T. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (1st ed. 1880).

13. 116 U.S. 616, 630 (1886).

14. WASH. CONST. art. I, § 7. In 1910, Arizona adopted an identically worded measure. See ARIZ. CONST. art. II, § 8. Both states have construed the sections to be equivalent to the fourth amendment prohibition against unreasonable searches and seizures. The sections have not served as the launching point for a more expansive right of privacy. Indeed, Washington has yet to recognize the invasion of privacy tort. See *Toward a Right of Privacy*, *supra* note 1, at 726-27.

15. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

From these beginnings American privacy law evolved. Primarily because of the nature of our constitutional and judicial system, the law of privacy developed along two separate tracks. One track—constitutional privacy—involved the citizen's effort to assert a right of privacy against governmental intrusion. Such privacy cases invariably involved the federal or state constitutions, since only through constitutional limitations can the power of the government be restrained.¹⁶

The second track—the tort law of privacy—involved the citizen's effort to assert a right of privacy against intrusion by other private citizens or private businesses. It was this sort of privacy that Warren and Brandeis described in 1890. Recognition of the new tort, invasion of privacy, could be accomplished directly by judicial or legislative decision and did not involve constitutional interpretation at all.¹⁷

In the twentieth century there has been considerable development of both kinds of privacy law. The invasion of privacy tort has been recognized by most states, usually by judicial decision, but in some states by legislative action.

As he was wont to do, Professor Prosser dissected the right of privacy and announced that it could be divided into four separate parts. One's privacy, he said, could be invaded by:

(1) *appropriation*—unauthorized use of a person's name or likeness, usually in advertising;

(2) *intrusion*—physical invasion or electronic eavesdropping in one's home or place of business;

(3) *public disclosure of private facts*—dissemination of true (and therefore not defamatory), but objectionable, information about a person, as by posting a sign that a person owed money and would not pay; or

(4) *false light in the public eye*—giving publicity to facts, whether or not defamatory, which place a person in a false light, for example, using a picture of an honest taxi driver to illustrate a story about dishonest taxi drivers.¹⁸

16. In the case of the federal government, the Constitution is a grant of power. Constitutional limitations exist by implication, since the federal government cannot act in excess of the power it has been granted. In the case of state governments, the constitutions are direct limitations on otherwise unrestrained sovereign power.

17. State constitutions were sometimes incidentally involved, as state courts pondered whether they had the power to "recognize"—in essence, create—a new tort or whether that was exclusively a legislative prerogative. This determination generally involved examination of something like the "access to courts" provision of the state constitution. See section IVA(1) *infra*.

18. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 117, at 804-14 (4th ed. 1971).

Prosser's classification of tort privacy cases was adopted by the *Restatement (Second) of Torts*,¹⁹ for which Prosser served as reporter, and has been very influential with the courts.²⁰ But while the Prosser imprimatur has undoubtedly helped gain acceptance for privacy cases in the courts, Prosser also asserted that the right of privacy had no conceptual unity and should actually be broken into four component torts. His view has not gone unchallenged,²¹ and it seems manifest that the four categories merely represent modes of intrusion into a physical and psychological zone which one has a right to expect will remain inviolate. If the division of privacy law into tort and constitutional aspects has inhibited development of a general theory of privacy, Prosser's further subdivision has compounded the problem.

Constitutional privacy law developed somewhat more slowly than the tort law. Although the Supreme Court recognized in *Boyd* that privacy was one of the interests safeguarded by the Constitution, formalistic legal reasoning emphasized the protection of physical objects, spaces, and persons. Thus, in 1928 the Supreme Court held that the fourth amendment did not protect telephone calls from unauthorized wiretapping because such calls were not "*things* to be seized."²² But twentieth century social and technological realities are often at odds with the eighteenth century political theory underlying the Constitution, and the Court increasingly moved toward a more interest-oriented analysis. By the mid-1960's, the Court had concluded that "the principal object of the Fourth Amendment is the protection of privacy rather than property"²³ The Court recognized privacy as also protected by the first, third, fifth, eighth, and ninth amendments.²⁴

Finally, in 1965, the Supreme Court recognized a right of privacy based in the United States Constitution.²⁵ In many ways a curious creation, this right of privacy has its source in the "liberty" pro-

19. See *RESTATEMENT (SECOND) OF TORTS* §§ 652B-652E (1977).

20. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962, 964 (1964).

21. *Id.*

22. *Olmstead v. United States*, 277 U.S. 438, 464 (1928).

23. *Warden v. Hayden*, 387 U.S. 294, 304 (1967) (citations omitted).

24. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (first amendment); *Stanley v. Georgia*, 394 U.S. 557 (1969) (first amendment); *Katz v. United States*, 389 U.S. 347, 350 n.5 (1967) (citing third amendment); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964) (fifth amendment); *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (eighth amendment) (by implication); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (first, third, fourth, fifth, and ninth amendments) (Douglas, J.); *id.* at 486 (ninth amendment) (Goldberg, J., concurring).

25. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

tected by the fourteenth amendment.²⁶ It protects the right of an individual to make important decisions about marriage, procreation, contraception, abortion, family relationships, childrearing, and education without government interference.²⁷ The Burger Court has generally resisted any effort to expand or diminish this federal right of privacy,²⁸ though it was that Court which rendered the abortion decisions in 1973.²⁹

Thus, the right of privacy has developed along two parallel tracks, and the twain have not met. The tort right of privacy is founded exclusively in state law. It protects against invasion of privacy by private persons or entities. It protects one's "interest in avoiding disclosure of personal matters"³⁰ or what might be called one's "right to selective disclosure."³¹ In contrast, the federal right of privacy is grounded exclusively in the Federal Constitution. It protects against invasion of privacy by governmental, not private, intrusion. It protects one's "independence in making certain kinds of important decisions,"³² or what might be termed one's "autonomy."³³ When, on occasion, the Supreme Court has been invited to merge the two, it has steadfastly refused to do so.³⁴

It is the limited scope of the federal privacy right which makes essential the addition of such a right to state constitutions. Even during the Warren era, when one would expect the Court to have taken an expansive view of privacy, the Court said, "the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States."³⁵ Outside of the marriage-procreation-childrearing areas, then, any protection of

26. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

27. *Id.* at 152-53 (1973).

28. See *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (contraceptive sales); *Whalen v. Roe*, 429 U.S. 589 (1977) (disclosure of medical information; federal right of privacy might be implicated in limited circumstances); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (abortion regulation); *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976), *aff'g* 403 F. Supp. 1199 (E.D. Va. 1975) (consensual homosexual relations); *Kelley v. Johnson*, 425 U.S. 238 (1976) (police hair length regulations); *Paul v. Davis*, 424 U.S. 693 (1976) (disclosure of information).

29. *Doe v. Bolton*, 410 U.S. 179 (1973); *Roe v. Wade*, 410 U.S. 113 (1973).

30. *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (footnote omitted).

31. Beardsley, *Privacy: Autonomy and Selective Disclosure*, in *PRIVACY* 56 (J. Pennock & J. Chapman eds. 1971).

32. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (footnote omitted).

33. Beardsley, *supra* note 31.

34. *Whalen v. Roe*, 429 U.S. 589 (1977) (possibility not entirely foreclosed); *Paul v. Davis*, 424 U.S. 693 (1976).

35. *Katz v. United States*, 389 U.S. 347, 350-51 (1967) (footnote omitted).

privacy against governmental intrusion must be done by the states.³⁶

The crucial position of the states was underlined by the 1977 report of the Federal Privacy Protection Study Commission. It said:

The States have been active in privacy protection, and in many cases innovative, but neither they nor the Federal governmental have taken full advantage of each other's experimentation. Altogether, the Commission's inquiry into State record-keeping practices forces it to conclude that an individual today cannot rely on State government to protect his interests in the records and record-keeping practices of either State agencies or private entities.³⁷

Moreover, state sovereignty stands as a barrier to federal legislation to regulate state government recordkeeping, except as a condition of federal funding.³⁸

Ten states have adopted express language in their constitutions to protect privacy—eight of them since 1968.³⁹ Florida, whose 1968 constitutional provision protecting "private communications" from unreasonable searches and seizures was quoted above, is one of the ten. The other states' privacy sections are all more extensive than Florida's but differ considerably from each other. The evolution and case law under each was reviewed extensively in *Toward a Right of Privacy* and will not be repeated here, though the text of each is reproduced in the Appendix. The experience of the states, even in such a short time, teaches valuable lessons about what to do—and what not to do—in developing a state right of privacy.

The most successful approach has been to adopt a freestanding state right of privacy, either in a separate section of the constitution or in the list of inalienable rights. Only three states have done this, and their formulations bear repeating here. All were adopted in 1972.

Alaska's right of privacy was adopted by amendment. Article I, section 22, provides: "Section 22. Right of Privacy.—The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section."

36. Congress must do so in the case of federal invasions of privacy not covered by existing federal constitutional provisions.

37. PRIVACY PROTECTION STUDY COMMISSION, *PERSONAL PRIVACY IN AN INFORMATION SOCIETY* 489 (1977).

38. *Id.* at 488-89; see *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976).

39. Washington and Arizona had adopted limited privacy provisions in 1889 and 1910, respectively. See note 14 and accompanying text *supra*, and Appendix.

Montana's right of privacy and right to know were adopted as part of its 1972 constitution. Article II, sections 9 and 10, provide:

Section 9. Right to know.—No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Section 10. Right of privacy.—The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

California's privacy right was added by amendment. Article I, section 1, reads: "Section 1. Inalienable Rights.—All people are by nature free and independent and have inalienable rights. Among those are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and privacy." California's right of privacy, unlike the rights recognized in Alaska and Montana, reaches private action as well as state action. In this respect, California's privacy right is more sweeping than that of any other state.

If Florida's right of privacy and related sections are approved in November, Florida will become the fourth state to adopt a strong, freestanding privacy right in its constitution.

IV. THE FLORIDA LAW OF PRIVACY

Florida privacy law has followed many of the patterns outlined above. Since 1944, Florida has recognized the invasion of privacy tort, the dimensions of which are now reasonably well defined. The Florida Legislature has enacted some measures designed to protect privacy, while also adopting strong legislation to guarantee open meetings and open public records. And the courts have recognized that privacy is an interest protected by some state constitutional provisions. Since 1968, the Florida Constitution has protected private communications from unreasonable search and seizure; and, since 1976, the constitution has required substantial public financial disclosure by elected constitutional officers. The Florida Supreme Court has not discerned a constitutional right of privacy in the current constitution, though one district court of appeal has recently done so.⁴⁰

40. *Byron Harless, Schaffer, Reid & Assoc. v. State ex rel. Schellenberg*, No. DD-30 (Fla. 1st Dist. Ct. App. June 1, 1978), discussed in sections IVC and IVF *infra*.

A. *The Invasion of Privacy Tort*

1. *A Tort is Born*

The Florida Supreme Court first recognized the invasion of privacy tort in 1944 in *Cason v. Baskin*.⁴¹ Zelma Cason sued authoress Marjorie Kinnan Baskin, better known as Marjorie Kinnan Rawlings, for having depicted her in a recognizable form in the book *Cross Creek*. Baskin had described Zelma as "'an ageless spinster resembling an angry and efficient canary . . . [who combined] the more violent characteristics of both [a man and a mother].'"⁴² Although the full treatment of Zelma went on to portray her "as a fine and attractive personality,"⁴³ it was nevertheless "a rather vivid and intimate character sketch."⁴⁴

The trial court dismissed the complaint, but the supreme court reversed. The court conducted a comprehensive review of the law of privacy and concluded that if the book had thrust Zelma into the public eye without her consent, she would have a *prima facie* case for at least nominal damages.

But the court was faced also with the question of whether it had the power to recognize a new tort, or whether that was a legislative function. Justice Armstead Brown found two sections of the state constitution to be relevant. Section 1 of the declaration of rights in the 1885 constitution provided that "[a]ll men . . . have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring[,] possessing and protecting property, and pursuing happiness and obtaining safety."⁴⁵ More important, section 4 guaranteed that "[a]ll courts in this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy"⁴⁶

The court decided that the word "person," used in the latter section, included the "mind and spirit" as well as "thoughts, emotions and feelings."⁴⁷ And, while the courts could not exercise legislative power, they had the authority, Justice Brown reasoned, to fashion a remedy for "an injurious invasion of any right of the individual which is recognized by or founded upon any applicable principle of law, statutory or common"⁴⁸ Section 4 was a mandate

41. 30 So. 2d 635 (Fla. 1947); 20 So. 2d 243 (Fla. 1944). See also Annot., 168 A.L.R. 430 (1947).

42. 20 So. 2d at 245.

43. *Id.* at 247.

44. *Id.*

45. *Id.* at 250 (current version at FLA. CONST. art. I, § 2).

46. 20 So. 2d at 250 (current version at FLA. CONST. art. I, § 21).

47. 20 So. 2d at 250.

48. *Id.*

to fashion such a remedy. Section 1 was not the source of the right of privacy but rather was evidence of the fundamental principles of the common law.

The court recognized that the right of privacy had limitations, which included those imposed by freedom of speech and press. Thus there was a privilege to publish legitimate matters of public or general interest, though the privilege did not extend to matters of "‘mere curiosity.’"⁴⁹ Additionally, the right of privacy would be governed by ordinary tort law limitations: a reasonable person standard, foreseeability of injury, and the "‘customs of the time and place.’"⁵⁰

The court adopted Warren and Brandeis' statement of the scope of the tort, which bears repeating here:

"In general, then, the matters of which the publication should be repressed may be described as those which concern the private life, habits, acts and relations of an individual, and have no legitimate connection with his fitness for a public office which he seeks or for which he is suggested, or for any public or quasi public position which he seeks or for which he is suggested, and have no legitimate relation to or bearing upon any act done by him in a public or quasi public capacity. . . . Some things all men alike are entitled to keep from popular curiosity, whether in public life or not, while others are only private because the persons concerned have not assumed a position which makes their doings legitimate matters of public investigation."

"The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel."⁵¹

Truth is not a defense to an invasion of privacy action, since the interest invaded is privacy, regardless of the truth or falsity of the statement. Absence of malice would likewise not be a defense, nor would special damages need to be proved.

At trial after remand, authoress Baskin won a verdict on the defense that *Cross Creek* "was of legitimate public and general in-

49. *Id.* at 251 (citing 41 AM. JUR. Privacy § 14 (1942)).

50. *Id.* (citing 41 AM. JUR. Privacy § 12 (1942)).

51. *Id.* at 252. Again relying on Warren and Brandeis, the court said that "mere spoken words cannot afford a basis for an action based on an invasion of the right of privacy." *Id.* Prosser points out that "the growth of radio alone has been enough to make this quite obsolete, and there now can be little doubt that writing is not required." W. PROSSER, *supra* note 18, § 117, at 810 (footnotes omitted); accord, *Santiesteban v. Goodyear Tire & Rubber Co.*, 306 F.2d 9, 11 (5th Cir. 1962); see section IVA(4) *infra*.

terest.”⁵² On appeal the Florida Supreme Court disagreed, concluding that there was no “pre-existing legitimate general or public interest” in Zelma Cason, apart from that created by the book.⁵³ A closely divided court rendered judgment for Miss Cason but, finding that no actual damages had been shown, awarded nominal damages only.

Florida decisions have since filled out the contours of this tort right of privacy, generally along the lines described by Justice Brown. Prosser’s four categories are helpful in understanding these decisions so far as they describe certain common factual patterns. The categories are not, however, conceptually distinct. The cases are not easy to classify, and many fit more than one category. In pleading, the pattern has been to follow the more general terminology of Warren and Brandeis, or of *Cason*; the use of Prosser’s terminology here is a matter of convenience rather than of analytical necessity.⁵⁴

2. Appropriation

This category involves the appropriation of one’s name or likeness for some advantage, usually pecuniary.⁵⁵ While this usually involves advertising, *Cason* may be classified here. As the court opinions point out, *Cross Creek* was a best seller and a tremendous financial success; Zelma’s “pen portrait” had been appropriated for private gain.

No subsequent cases have rested primarily on this ground. The ambiguity of the classification can be seen, for whenever a profit-making enterprise—including a newspaper—invades someone’s privacy under one of the other classifications, arguably there has also been an appropriation.

Florida has by statute amplified the remedies available for this form of invasion of privacy. Section 540.08, Florida Statutes,⁵⁶ prohibits publication of the name or likeness of a natural person without written or oral consent. The consent may be given by the person himself or by any person or corporation authorized to license commercial use of his name or likeness, or, if he is deceased, by his surviving spouse and children. Damages and injunctive relief are available.

The statutory protection extends for forty years after a person’s

52. 30 So. 2d 635, 638 (Fla. 1947).

53. *Id.* at 638.

54. See Note, *The Right To Be Let Alone*, 17 U. FLA. L. REV. 597 (1965), for an earlier classification using Prosser’s scheme.

55. *Id.*

56. (1977).

death. The law exempts publication in connection with bona fide news reporting as well as photographs of a person "solely as a member of the public" where the individual "is not named or otherwise identified."⁵⁷ There is no liability for broadcasters or publishers who accept paid advertising without knowledge or notice that the required consent has not been obtained.⁵⁸ Finally, the statutory remedies are in addition to, and not in limitation of, the remedies available "under the common law against the invasion of his privacy"⁵⁹—an indirect legislative endorsement of the line of cases since *Cason*.

Although this statute has been in existence since 1967, no appellate cases construing it have been reported. As has been accomplished by decision in some other jurisdictions, the statute recognizes a proprietary interest in the use of one's own name or likeness which can be licensed to others.⁶⁰ The statute pertains only to natural persons, presumably because other measures protect unauthorized use of a corporate name.⁶¹ Florida courts have not had occasion to consider the general rule that "the right of privacy is one pertaining only to individuals, and that a corporation or a partnership cannot claim it as such"⁶²

The statute is in accord with Florida's survival act, under which most causes of action in tort survive one's death.⁶³ But the law is liberal in allowing suit for publication about someone who is dead. Common law decisions hold the opposite.⁶⁴

3. *Intrusion*

This form of invasion of privacy involves physical intrusion, eavesdropping, electronic surveillance, and some other forms of unauthorized prying.⁶⁵ The cause of action will lie against a municipality, for example, for police negligence in wrongly entering and searching a person's residence.⁶⁶ Surveillance by private detectives

57. FLA. STAT. § 540.08(3)(c) (1977).

58. *Id.* § 540.10.

59. *Id.* § 540.08(6).

60. See W. PROSSER, *supra* note 18, § 117, at 807.

61. FLA. STAT. § 607.024(1) (1977).

62. W. PROSSER, *supra* note 18, § 117, at 815 (footnotes omitted).

63. FLA. STAT. § 46.021 (1977).

64. W. PROSSER, *supra* note 18, § 117, at 815.

65. *Id.* at 807-08.

66. *Thompson v. City of Jacksonville*, 130 So. 2d 105 (1st Dist. Ct. App. 1961), *cert. denied*, 147 So. 2d 530 (Fla. 1962). The opinion does not reveal the precise circumstances causing the intrusion. The main issue in *Thompson* was whether invasion of privacy was an intentional tort, in which case the applicable Florida law was believed to bar municipal liability, or whether it could be committed through negligence, in which case the municipality would be liable. The court took the latter view. See also *Modlin v. City of Miami Beach*, 201 So. 2d 70, 76 (Fla. 1967).

does not automatically constitute an invasion of privacy, but it is actionable if the surveillance is done in an intrusive manner.⁶⁷ Remedies for unauthorized wiretapping have been provided by law.⁶⁸

In *Harms v. Miami Daily News, Inc.* in 1961 a newspaper article stated, "'Wanna hear a sexy telephone voice? Call ____ [the article listed the phone number] and ask for Louise.'" ⁶⁹ Louise was not impressed by the resulting flood of telephone calls and recovered a judgment. But no invasion of privacy was found two years later where an error in the telephone directory resulted in numerous calls for "Charlie."⁷⁰

4. *Public Disclosure of Private Facts*

Here the cause of action exists for "publicity, of a highly objectionable kind, given to private information about the plaintiff, even though it is true and no action would lie for defamation."⁷¹

Aside from *Cason*, Florida's first case of this type resulted in liability for a newspaper which published information about a confidential narcotics addiction proceeding, even though the information had been acquired from public docket entries.⁷² That decision cannot survive the holding of the United States Supreme Court in *Cox Broadcasting Corp. v. Cohn*.⁷³ On the other hand, the First District Court of Appeal held that there was no invasion of privacy where a newspaper published detailed accounts of a pending confidential adoption proceeding, because there had been no showing the information had been obtained from confidential court files.⁷⁴

67. *Sharp v. Sharp*, 209 So. 2d 245 (Fla. 2d Dist. Ct. App. 1968); *Tucker v. American Employers' Ins. Co.*, 171 So. 2d 437 (Fla. 2d Dist. Ct. App. 1965), *subsequent summary judgment rev'd and trial ordered*, 218 So. 2d 221 (Fla. 4th Dist. Ct. App.), *writ discharged as improvidently issued*, 227 So. 2d 482 (Fla. 1969).

FLA. STAT. ch. 493, pt. I (1977) establishes a regulatory scheme for private investigative agencies and prohibits such already illegal practices as assault, battery, kidnapping, impersonation of a law enforcement officer, and use of force. *Id.* § 493.14. However, the statute also prohibits divulgence of investigatory information, except to the investigator's principal. *Id.* § 493.19.

68. FLA. STAT. § 934.10 (1977).

69. 127 So. 2d 715 (Fla. 3d Dist. Ct. App. 1961).

70. *Britt v. Southern Bell Tel. & Tel. Co.*, 21 Fla. Supp. 72 (4th Cir. Ct. 1963).

71. W. PROSSER, *supra* note 18, § 117, at 809.

72. *Patterson v. Tribune Co.*, 146 So. 2d 623 (Fla. 2d Dist. Ct. App. 1962), *cert. denied*, 153 So. 2d 306 (Fla. 1963). The court relied on the fact that commitment records were by statute confidential, though docket entries were not.

73. 420 U.S. 469, 496 (1975) ("Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it."). See also *Landmark Communications, Inc. v. Virginia*, 46 U.S.L.W. 4389 (U.S. May 2, 1978); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

74. *Jordan v. Pensacola News-Journal, Inc.*, 314 So. 2d 222 (Fla. 1st Dist. Ct. App. 1975). Very similar reasoning was followed by the United States Supreme Court in a recent nonprivacy case, *Landmark Communications, Inc. v. Virginia*, 46 U.S.L.W. 4389 (U.S. May 2, 1978).

The leading case in this area is the Fifth Circuit's decision in *Santiesteban v. Goodyear Tire & Rubber Co.*, in which the court construed Florida privacy law.⁷⁵ Plaintiff Santiesteban had purchased tires from Goodyear on credit and was current in his payments. Believing he was not, Goodyear employees went to the country club at which Santiesteban worked, removed the tires from his automobile, and left the automobile sitting on its rims in the parking lot in full view of coworkers and club members. The court had little difficulty concluding a cause of action had been stated.

5. *False Light in the Public Eye*

This invasion of privacy can take various forms. One of the most common is the use of a person's picture in a book or an article with which it has no connection—for example, using an honest taxi driver's photograph to illustrate an article about dishonest taxi drivers or placing a person's name or photograph in a publicly distributed list of convicted criminals when, in fact, there has been no conviction of a crime.⁷⁶

Florida's leading case is *Jacova v. Southern Radio & Television Co.*⁷⁷ Jacova had the misfortune to patronize a hotel coffee shop just as the local authorities descended on it to conduct a gambling raid. Jacova was released as soon as the police realized he was not the man they sought. Nonetheless, a local television station televised a photograph of Jacova being searched by the police. In finding no liability, the Florida Supreme Court held that "a television company . . . has a qualified privilege to use in its telecast the name or photograph of a person who has become an 'actor' in a newsworthy event."⁷⁸

Relief was likewise denied a plaintiff filmed by a television crew in a bar in the aftermath of an evacuation for a bomb scare.⁷⁹ But, as *Harms* illustrates, not every matter chosen for publication is automatically newsworthy in the eyes of the law. There must be some genuine public interest beyond mere curiosity.

6. *Defenses*

As *Jacova* illustrates, a person's status as a "public figure" or his involvement in a "newsworthy event" may be a defense to an action

75. 306 F.2d 9 (5th Cir. 1962).

76. W. PROSSER, *supra* note 18, § 117, at 812-13.

77. 83 So. 2d 34 (Fla. 1955).

78. *Id.* at 37. It is debatable whether the rule was correctly applied in this case. The picture of Jacova being frisked was used during part of the telecast about gangsters and gambling, without explaining that he was a bystander.

79. *Stafford v. Hayes*, 327 So. 2d 871 (Fla. 1st Dist. Ct. App.), *cert. denied*, 336 So. 2d 604 (Fla. 1976). Plaintiff was a patron in a Tallahassee bar when the Capitol was evacuated for a bomb scare. Many of the evacuees retreated to the bar. They were followed by a television crew which recorded the event for the evening news.

by him for invasion of privacy. However, precise definitions of "newsworthy event" and "public figure" have eluded the law of libel and privacy. Determinations of "public figure" or "newsworthy event" status have largely been made on a case-by-case basis. *Jacova* was relied on in a Florida libel case in which the court held that a newspaper publisher who undertakes a public campaign against a large local business thereby becomes a public figure for purposes of that controversy.⁸⁰

In another libel case, *Time, Inc. v. Firestone*, the United States Supreme Court ruled that filing a divorce action does not make one a public figure.⁸¹ One has little choice whether to go to court or not, since a divorce can be obtained only through court action. Moreover, the *Cox Broadcasting* rule protecting the publication of truthful information found in court records does not create a privilege for all reports of judicial proceedings. One can still be held liable for libelous statements, if intentionally or negligently made.⁸²

Consent is a defense to a complaint of invasion of privacy by intrusion, even if the consent came after the intrusion had commenced. The consent may be shown by conduct as well as by words.⁸³ And, as suggested in *Cason*, to state a cause of action for invasion of privacy by publication, the published matter must in some way identify the person whose privacy is being invaded. Thus, publication of a photograph retouched to make it impossible to identify the plaintiff or his household does not constitute invasion of privacy.⁸⁴

The Florida Supreme Court held in *Florida Publishing Co. v. Fletcher* that there is neither trespass nor invasion of privacy when a news photographer accompanies a fire marshal onto premises where there has been a fire, takes pictures, and publishes them in the newspaper.⁸⁵ The court said that consent to the entry was implied by custom and usage and would be voided only if actual ob-

80. *Gibson v. Maloney*, 231 So. 2d 823 (Fla.), cert. denied, 398 U.S. 951 (1970).

81. 424 U.S. 448 (1976).

82. The constitutional privilege developed in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), was applied to the law of privacy in *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

83. *Rawls v. Conde Nast Publications, Inc.*, 446 F.2d 313 (5th Cir. 1971), cert. denied, 404 U.S. 1038 (1972). Plaintiff's minor children allowed photographers from *Vogue Magazine* to use the home as a setting for fashion pictures. Plaintiff returned while the session was in progress and allowed it to be completed but a month later demanded that defendant withdraw the photographs from publication.

84. *Id.*

85. 340 So. 2d 914 (Fla. 1976), cert. denied, 431 U.S. 930 (1977). The fire occurred while plaintiff was out of town, and plaintiff's seventeen-year-old daughter died in the blaze. When the daughter's corpse was moved, her outline remained as the only unburned area in the charred floor. This "silhouette of death," published in the newspaper, was the source by which plaintiff learned of her daughter's death.

jection was made by the owner of the premises. There was no invasion of privacy by intrusion. Nor did publication of the photographs constitute an invasion of privacy, for a major fire was a newsworthy event.

These general outlines parallel the development of tort privacy law nationally. Indeed, Florida courts frequently look to the decisions of other states when confronted with novel questions. As the comparatively small number of cases illustrates, the invasion of privacy tort has not been a prolific breeder of litigation. In the sections that follow, the focus shifts to legislative and constitutional protection of privacy, but the tort is involved in some of the topics.

B. Privacy and the Private Sector

1. Consumer Credit Reporting Practices

Mutual credit organizations have generally been afforded a qualified privilege against defamation actions, so as to allow the sharing of credit information, at least so far as credit inquiries are made in good faith and the information is shared only with subscribers.⁸⁶ In *Vinson v. Ford Motor Credit Co.*,⁸⁷ the First District Court of Appeal expressly rejected this doctrine, declining to follow a 1918 Florida Supreme Court case.⁸⁸ The court concluded that the rule could no longer be justified in the light of changed conditions and held that privilege would not shield the defendant from a libel action for dissemination of untrue and grossly inaccurate credit information about the plaintiff. Arguably, the same result could have been reached under conventional doctrine, which holds the conditional privilege available only if the agency acted in good faith.⁸⁹ Although *Vinson* was a libel case, the same type of suit has been brought under a privacy theory.⁹⁰

Credit reporting has been substantially affected by recent statutes, including the Federal Fair Credit Reporting Act⁹¹ and portions of a state law dealing primarily with debt collection practices.⁹² The Florida law simply regulates the disclosure of credit information to third persons.⁹³ However, the Federal Act is a comprehensive scheme providing rights of access and dispute reconciliation, limit-

86. W. PROSSER, *supra* note 18, § 115, at 790; *see id.* § 117, at 818.

87. 259 So. 2d 768 (Fla. 1st Dist. Ct. App. 1972).

88. *Putnal v. Inman*, 80 So. 316 (Fla. 1918).

89. *See id.*; *Caldwell v. Personal Fin. Co.*, 46 So. 2d 726 (Fla. 1950).

90. *Chrysler Credit Corp. v. Rehurek*, 317 So. 2d 857 (Fla. 2d Dist. Ct. App. 1975).

91. 15 U.S.C. §§ 1681-1681t (1970).

92. FLA. STAT. ch. 559, pt. V (1977).

93. *Id.* § 559.72.

ing use of obsolete credit information, and providing remedies.⁹⁴ A qualified privilege is provided for certain disclosures made under the Federal Act, thus limiting to some extent the impact of the *Vinson* decision.⁹⁵

The Federal Act allows states to adopt more stringent credit standards, and some states have done so,⁹⁶ though Florida has not. One metropolitan Florida county adopted a comprehensive credit ordinance. However, much of the ordinance was promptly invalidated by a poorly reasoned federal district court decision.⁹⁷ Thus, in Florida, credit reporting is regulated primarily by federal law.

2. Collection Practices

Santiesteban is the leading case finding an invasion of privacy through objectionable credit collection practices. State privacy law has been expanded by the enactment of part V of chapter 559, Florida Statutes, which sets up a regulatory scheme for collection agencies, specifies a lengthy list of prohibited practices, and provides for liquidated damages, attorneys' fees and costs for a person aggrieved by a violation. One court has ruled that the statute comes under the general rubric of the tort right of privacy, saying "the legislature has further defined and protected an individual's right of privacy in this state."⁹⁸ And, while the creditor still has some latitude to invade privacy to collect a debt, the reasonableness of the invasion is a matter for the jury.⁹⁹ The statute covers not only commercial agencies but also small non-interest-bearing loans between private individuals, making it extremely broad in scope.¹⁰⁰

3. Depositor Records

The privacy of banking records has been a matter of increasing concern since the United States Supreme Court's decisions in *California Bankers Association v. Shultz*¹⁰¹ and *United States v.*

94. The Act is summarized in *PRIVACY LAW IN THE STATES*, *supra* note 5, at 7-9.

95. See *Retail Credit Co. v. Dade County, Fla.*, 393 F. Supp. 577, 583-84 (S.D. Fla. 1975); 15 U.S.C. § 1681h(e) (1970).

96. See *PRIVACY LAW IN THE STATES*, *supra* note 5, at 9-11.

97. *Retail Credit Co. v. Dade County, Fla.*, 393 F. Supp. 577 (S.D. Fla. 1975). The ordinance contained measures identical to those in effect in other states. See *PRIVACY LAW IN THE STATES*, *supra* note 5, at 9-11. In effect, the court required the county to resolve policy issues in the same way that Congress had, despite the express provision of the Fair Credit Reporting Act allowing states to adopt more stringent regulations.

98. *Collection Bureau v. Continental Cas. Co.*, 342 So. 2d 1019, 1020 (Fla. 4th Dist. Ct. App. 1977).

99. *Story v. J.M. Fields, Inc.*, 343 So. 2d 675 (Fla. 1st Dist. Ct. App.), *cert. denied*, 348 So. 2d 954 (Fla. 1977) (100 telephone calls in a five-month period).

100. *Heard v. Mathis*, 344 So. 2d 651 (Fla. 1st Dist. Ct. App. 1977) (oral, non-interest-bearing loan of \$200).

101. 416 U.S. 21 (1974).

Miller.¹⁰² Those decisions held that an individual depositor's banking records are business records of the bank. An individual has no fourth amendment interest in his banking records, such as checks and deposit slips, that are in possession of the bank. Thus, an investigative agency may subpoena those records directly from the financial institution without notifying the depositor before or after the fact. These decisions, though, apply only where access is sought by a federal agency. State law still governs access by state authorities.

Florida has no statute regulating the confidentiality of depositor records in banks. In 1935, the Florida Supreme Court held that banking records are not privileged from discovery in civil litigation.¹⁰³ But the Third District Court of Appeal held more recently in *Milohnich v. First National Bank* that there is an implied contractual duty that a bank not disclose information about a depositor's account negligently, wilfully, maliciously, or intentionally.¹⁰⁴ *Milohnich* seems to have been implicitly approved by the Florida Supreme Court in *Hagaman v. Andrews*, in which the court noted that *Milohnich* did not deal with disclosure required by the government or under compulsion of law.¹⁰⁵ The court in *Hagaman* sustained, over a claim of associational privacy, the power of a legislative committee to obtain discovery of banking records of a private organization for an official investigation.¹⁰⁶

Unlike banking records, the confidentiality of savings and loan association records is regulated by statute in Florida. Access to a depositor's records may be had by the depositor, by the banking regulatory authorities, upon court order, or by legislative subpoena.¹⁰⁷

A recent statute authorizing remote financial service units (electronic funds transfer systems) contains privacy provisions. System owners are required to maintain safeguards to protect funds and information. Rules may be adopted by the regulatory authorities, and annual reports must be made discussing the protection of privacy and the regulation of access to customer accounts. Use of social

102. 425 U.S. 435 (1976).

103. *Commercial Bank v. Atlanta & St. A.B. Ry.*, 162 So. 512 (Fla. 1935).

104. 224 So. 2d 759 (Fla. 3d Dist. Ct. App. 1969). The court did not mention or distinguish *Commercial Bank v. Atlanta & St. A.B. Ry.*, 162 So. 512 (Fla. 1935).

105. 232 So. 2d 1 (Fla. 1970).

106. *Hagaman* involved a subpoena duces tecum issued by the House Committee on Elections for banking records of The Governor's Club. The committee sought the records for use in an investigation. The court rejected the associational privacy claim on the particular facts rather than in principle. See also *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963).

107. FLA. STAT. § 665.111 (1977).

security numbers as identifiers is forbidden. Civil remedies are provided in case of violation.¹⁰⁸

Neither Florida's statutes nor the case law deals with the crucial issue of customer notification when an agency seeks a customer's financial records. In contrast, several states require service of process on the customer as well as on the bank. California expressly provides a procedure by which a customer may seek to quash a subpoena and confers on the customer standing to do so, thus rejecting at the state level the doctrine of *California Bankers and Miller*.¹⁰⁹ A similar process is available in California civil discovery.¹¹⁰

4. *Medical Records*

Reports of mental or physical examinations are made confidential in Florida by statute. The law creates a right of access for the patient, or for the guardian or personal representative where appropriate. Otherwise, reports can be released only by written permission of the patient (or guardian or personal representative). An exception exists when a person or organization has procured an examination with the patient's consent; the report may go directly to the person or organization. When a physical examination is ordered pursuant to rule 1.360, Florida Rules of Civil Procedure, disclosure must be made to both parties.¹¹¹

C. *The Public Sector: The Right of Privacy vs. The Right to Know*

Where public-sector activities are concerned, conflict often develops between two competing policies. On the one hand, the public has the right to know what its government is doing. To that end, access is needed to the records of public agencies, the meetings of public bodies, and the activities of public officials. On the other hand, individual rights of privacy need protection. To that end, some records and official proceedings are made confidential. Although the activities of public officials are generally subject to public scrutiny, even a public official has a zone of privacy, albeit a smaller zone than that of private citizens. The difficulty lies in determining precisely where to strike the balance.¹¹²

108. *Id.* § 659.062(13)-(14).

109. *PRIVACY LAW IN THE STATES*, *supra* note 5, at 12-13.

110. *Valley Bank v. Superior Court*, 542 P.2d 977 (Cal. 1975).

111. *FLA. STAT.* § 458.16 (1977).

112. Unconsidered for the moment is the fact that confidentiality sometimes protects a public purpose rather than individual privacy. Obvious examples include keeping civil service examination answers confidential and keeping competitive bids confidential until the time for the bid opening.

1. *Public Records*

Florida's "freedom of information act" is chapter 119, Florida Statutes.¹¹³ Section 119.01 declares the general policy that all state, county, and municipal records are at all times open for a personal inspection by any person.¹¹⁴ Section 119.07 implements the policy by commanding the custodians of records to permit public inspection, and section 119.02 provides penalties for failing to do so. Records are exempt only if they are "provided by law to be confidential or . . . are prohibited from being inspected by the public, whether by general or special law"¹¹⁵

There are numerous exemptions from disclosure. Generally exempt are case files made by government health, welfare, social service, and correctional agencies,¹¹⁶ though one notable exception is a statute making public the names of all welfare recipients and the amounts received.¹¹⁷ Likewise confidential is certain information gathered in connection with taxation,¹¹⁸ economic development,¹¹⁹ unemployment compensation,¹²⁰ and crimes compensation.¹²¹ A particularly comprehensive statute protects student records.¹²² Some court records are exempt from disclosure.¹²³ Much licensing and regulatory information is held confidential,¹²⁴ as are various agency

113. (1977).

114. "Public record" is defined as any document or other material, regardless of form, "made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." FLA. STAT. § 119.011(1) (1977).

In *PRIVACY LAW IN THE STATES*, *supra* note 5, it is observed that this definition is less comprehensive than that of states which include "any record or information that relates to the conduct of government or is in the possession of the State." *Id.* at 5-6 (footnotes omitted). *But see* Byron Harless, Schaffer, Reid & Assocs., Inc. v. State *ex rel.* Schellenberg, No. DD-30, slip op. at 7-9 (Fla. 1st Dist. Ct. App. June 1, 1978).

115. FLA. STAT. § 119.07(2) (1977).

116. *E.g.*, *id.* §§ 382.35 (birth records), 393.13 (retarded persons), 394.459 (clinical records of mental patients), 396.112 (alcohol treatment), 397.053, .096 (drug abuse), 400.321 (nursing home ombudsmen committees), .494 (home health agencies), 402.32 (school health services), 409.3636 (adult protective services), 413.012 (blind services), 413.22 (vocational rehabilitation), 458.22 (termination of pregnancy), 741.0592 (premarital medical examination), 827.07 (child abuse), .09 (abuse of developmentally disabled persons), 945.10, .25 (adult corrections), 959.225 (state youth services).

117. *Id.* § 409.355.

118. *Id.* §§ 195.027, .084, 198.09, 199.222, 206.95, 213.072, 214.21, 220.242.

119. *Id.* § 288.075.

120. *Id.* §§ 443.12, .16.

121. *Id.* § 960.15.

122. *Id.* §§ 228.093, 232.23, 239.77.

123. *E.g.*, *id.* §§ 39.03 (juvenile fingerprints), .12 (juvenile court records), 63.162 (adoption), 742.091 (certain paternity proceedings).

124. *E.g.*, *id.* §§ 322.125-.126 (driver licensing—medical disabilities), 377.606, .701 (energy), 403.111 (pollution control), 460.37 (chiropractic hospitals), 468.188 (electrical contractors), 473.06 (accountancy), 474.101 (veterinarians), 656.211, 658.10 (banking and finance), 657.061 (credit unions).

investigations,¹²⁵ examinations for licensing or public employment,¹²⁶ records relating to the regulation of agricultural marketing,¹²⁷ and library circulation records.¹²⁸ The statutes vary widely. Some confer exemption only on certain records, for the early phases of an investigation, or on complaints found not to be meritorious.¹²⁹

Public employee personnel records have not, in general, been made confidential, though statutory exemptions have been given employees of the educational system.¹³⁰ Medical records contained in public employee personnel files are deemed exempt from public disclosure,¹³¹ though the rationale for doing so seems questionable.¹³² Personnel files are otherwise deemed open for public inspection. An individual's desire for privacy, without more, is not enough to shield his records: in one case, a court ordered disclosure even though city employees had signed forms requesting that their own files not be released.¹³³

Thus far, the Florida Supreme Court has made no definitive statement on whether privacy rights would ever require the closing of personnel records in the absence of a statute. The court considered but avoided the issue in *News-Press Publishing Co. v. Wisher*.¹³⁴ There the district court of appeal had held that public policy required personnel files to be held in confidence,¹³⁵ relying in part on *Cason v. Baskin*. The Florida Supreme Court reversed on

125. *E.g.*, *id.* §§ 106.25 (election campaign financing), 112.324 (ethics commission), 215.19 (public works wage rates), 455.08 (professional and occupational licensing).

126. *Id.* § 119.07.

127. *E.g.*, *id.* §§ 502.051 (milk), 573.26 (celery and sweet corn marketing), .855 (soybean marketing), .882 (tobacco marketing), 601.77 (citrus).

128. Ch. 78-81, 1978 Fla. Sess. Law Serv. 179 (West) (SB 770 (1978)) (to be codified at FLA. STAT. §§ 119.07, 257.125).

129. *E.g.*, FLA. STAT. §§ 112.324 (public officers and employees—preliminary investigation confidential until alleged violator requests records be made public or until completed), 455.08 (similar) (1977).

130. *Id.* §§ 230.7591, as amended by ch. 78-3, 1978 Fla. Sess. Law Serv. 3 (West) (SB 216 (1978)) (community colleges), 231.29 (teacher performance evaluations), 239.78 (universities).

131. FLA. STAT. § 458.16 (1977), which provides a general privilege for all medical records. See Transcript of Fla. C.R.C. proceedings 227-28 (Dec. 8, 1977) [hereinafter cited as December 8, 1977 Transcript]. See also 1973 FLA. OP. ATT'Y GEN. 073-51.

132. The records are initially made confidential while in the hands of the physician by FLA. STAT. § 458.16 (1977). The record is deemed to retain its confidential character after it passes to a nonphysician's hands, so the confidentiality in effect "runs with the record." The difficulty is that § 458.16 is part of the Medical Practice Act, a chapter addressed to physicians and enforced through the licensing process. There are statutes which provide that confidentiality is not to be lost through disclosure, see §§ 394.459, 917.22, but § 458.16 is not one of them.

133. *Browning v. Walton*, 351 So. 2d 380 (Fla. 4th Dist. Ct. App. 1977).

134. 345 So. 2d 646 (Fla. 1977).

135. 310 So. 2d 345 (Fla. 2d Dist. Ct. App. 1975), *rev'd*, 345 So. 2d 646 (Fla. 1977). The power of the courts to create judicial exceptions to the public records law is considered below.

the narrow ground that the privacy claim was not warranted under the unusual facts of the case.¹³⁶ The court left open the question of whether under some circumstances privacy might dictate confidentiality, but the court clearly was not inclined to make personnel files confidential in their entirety.

The supreme court amplified its views in *Miami Herald Publishing Co. v. Marko*.¹³⁷ There a grand jury had criticized two highway patrolmen for misconduct but had not indicted them. A statute provided that such a report could not be released publicly unless the individual criticized first had an opportunity to review it and to move to suppress any portion which was "improper and unlawful."¹³⁸ Rejecting the argument that disclosure would violate the patrolmen's right of privacy, the court observed that "[t]he 'constitutional' right of privacy has generally been narrowly confined to matters of marital intimacy, procreation and the like."¹³⁹ Since the grand jury report criticized the patrolmen's performance of their official duties, the court concluded that it was "proper" and "lawful" within the meaning of the statute.

The First District Court of Appeal has recently held that certain personnel records must be kept confidential. In *Byron Harless, Schaffer, Reid & Associates, Inc. v. State ex rel. Schellenberg*, the Jacksonville Electric Authority had employed a psychological consulting firm to search for and interview applicants for the position of managing director.¹⁴⁰ Applicants were assured of confidentiality, and the interviews covered a great deal of highly personal information.¹⁴¹ A local television station sought access to the consultants' notes and papers, correctly arguing that they were, under Florida law, public records. The district court of appeal held that a fundamental right of privacy is guaranteed by the due process clauses of the Florida and Federal Constitutions which would be violated by

136. The county commission had, at its regular meeting, criticized a department head and directed that a letter be placed in the employee's file—but refused to name the department head or the department. The press then sought to peruse county employees' personnel files in order to discover the identity of the person reprimanded. The supreme court took a dim view of the county's effort to circumvent the open meetings law, reasoning that the identity of the employee and the letter both should have been disclosed.

137. 352 So. 2d 518 (Fla. 1977).

138. *Id.* at 519.

139. *Id.* at 520 n.4 (citing *Laird v. State*, 342 So. 2d 962 (Fla. 1977)).

140. No. DD-30 (Fla. 1st Dist. Ct. App. June 1, 1978).

141. The consulting firm gave the assurance of confidentiality to the interviewees after the general counsel of the Jacksonville Electric Authority advised that any notes would not be public records subject to disclosure.

When the case arrived in the court of appeal, the court recognized "the stake in this proceeding of persons not then before the court" and invited the identifiable interviewees to intervene under pseudonyms. *Id.*, slip op. at 2-3.

disclosure of the consultants' notes. The constitutional aspects of this rather sweeping decision are reviewed in section IVF below.

Like the dilemma regarding personnel records, public access to arrest records has posed a serious privacy issue in many jurisdictions.¹⁴² Arrest is not proof of guilt. It is only a minimal statement of probable cause—a statement that there is reason to believe a crime has been committed by the person arrested. Many perfectly valid arrests are found, on further investigation, to involve no crime at all. But the arrest record has been made and much evidence shows that it can create severe difficulty in obtaining employment, professional and occupational licensing, and the like—not to mention that it can cause simple embarrassment.

This problem is compounded by the failure to impose sufficient requirements for recording disposition information or to provide procedures for expungement in many arrest record systems. Control over access to information and procedures to prevent misuse or unauthorized release have been inadequate. The situation has improved much of late in many states, but not in Florida.

For a time it appeared that regulations of the Federal Law Enforcement Assistance Administration (LEAA) would force state adoption of privacy rules for LEAA-supported information systems.¹⁴³ However, protests by Florida and other states caused the LEAA regulations to be withdrawn.¹⁴⁴ Corrective legislation has not been enacted, and arrest records remain accessible to the public. It is clear that privacy measures like those taken by the Federal Bureau of Investigation¹⁴⁵ or the states of California¹⁴⁶ and Alaska¹⁴⁷ can prevent abuses without hampering law enforcement. Florida's failure to act must be considered a major unsolved privacy problem. In contrast to arrest records, investigative records are deemed confidential under the "police records rule," a public policy exception to the open records law.¹⁴⁸

It is not clear whether the courts any longer have the power to create judicial "public policy" exceptions to the public records law.

142. See, e.g., *Menard v. Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974); *Loder v. Municipal Court*, 553 P.2d 624 (Cal. 1976); *Toward a Right of Privacy*, *supra* note 1, at 642-46, 707-09.

143. See *PRIVACY LAW IN THE STATES*, *supra* note 5, at 7.

144. *Florida Times-Union*, Dec. 4, 1977, § B, at 2.

145. See 28 C.F.R. pt. 20, subpt. C (1977); *Toward a Right of Privacy*, *supra* note 1, at 645-46.

146. See *Loder v. Municipal Court*, 553 P.2d 624 (Cal. 1976).

147. See *Toward A Right of Privacy*, *supra* note 1, at 693 n.311.

148. *Lee v. Beach Pub. Co.*, 173 So. 440 (Fla. 1937). There is some irony in the fact that one of the few judicial exceptions to the public records law protects agency "privacy," while little attention has been paid the privacy situation of individuals who come into contact with the same agency in an arrest context.

In 1935, the Florida Supreme Court held that exceptions could only be created by statute.¹⁴⁹ But two years later the court transgressed its own ruling and created the judicial exception for the police records rule.¹⁵⁰ While often invited to create public policy exceptions, the courts have rarely done so, even where public harm would result from public disclosure.¹⁵¹ The Fourth District Court of Appeal has construed a 1975 amendment to the public records law to remove whatever judicial flexibility may have previously existed.¹⁵² On the other hand, the First District Court of Appeal has created a judicial exception since 1975, though the decision is anomalous and probably erroneous.¹⁵³

The Florida Supreme Court has not yet specifically addressed the subject. *Wisher* was decided on the basis of pre-1975 law, so the 1975 statute was not before the court. Even if the 1975 amendment removed the power to create judicial exceptions, the judiciary would, naturally, retain power to fashion remedies for violations of constitutional privacy, as in *Byron Harless*.

2. Open meetings

Section 286.011, Florida Statutes,¹⁵⁴ is Florida's "Government in the Sunshine" law, which provides that all governmental meetings are open to the public, except as otherwise provided in the Florida Constitution. Violation is a misdemeanor, and actions taken at a nonpublic meeting are void.

Like the public records law, Government in the Sunshine has generally been strictly enforced. Unlike the public records law, there has been great reluctance to create statutory exemptions. The law extends to all meetings of public officials, even if a quorum is not present.¹⁵⁵ Since there is no exemption for conferences with counsel, the law waives the attorney-client privilege for collegial public bodies.¹⁵⁶ The law extends to meetings of citizens' committees ap-

149. *State ex rel. Cummer v. Pace*, 159 So. 679 (Fla. 1935).

150. *Lee v. Beach Pub. Co.*, 173 So. 440 (Fla. 1937).

151. See, e.g., *Gannett Co. v. Goldtrap*, 302 So. 2d 174 (Fla. 2d Dist. Ct. App. 1974) (appraisal report).

152. *State ex rel. Veale v. City of Boca Raton*, 353 So. 2d 1194 (Fla. 4th Dist. Ct. App. 1977).

153. *State ex rel. City of Bartow v. PERC*, 341 So. 2d 1000 (Fla. 1st Dist. Ct. App. 1976). The court gave a substantive, rather than procedural, reading to the "reasonable times, under reasonable conditions" language of the statute, holding that a "reasonable time" for disclosure of PERC documents would be after PERC had completed its preliminary investigation.

154. (1977).

155. *Bigelow v. Howze*, 291 So. 2d 645 (Fla. 2d Dist. Ct. App. 1974).

156. *Times Publishing Co. v. Williams*, 222 So. 2d 470 (Fla. 2d Dist. Ct. App. 1969). The privilege is not waived, however, in those aspects of the attorney's duties that involve pending or impending litigation. *Id.* at 475.

pointed by a governmental entity¹⁵⁷ and makes public the quasi-judicial activities of deliberative bodies.¹⁵⁸ A constitution-based exception has been found for labor negotiations with public employees,¹⁵⁹ but the law has been found not to apply to consultations between a public official and his staff.¹⁶⁰

Privacy formed the basis for one of the few exclusions from the open meetings law. The supreme court has held that meetings cannot be closed in order to discuss personnel matters, the issue about which privacy concerns are most likely to be raised.¹⁶¹ But the First District Court of Appeal has since created a judicial exception designed in part to protect privacy, though the logic of this exception is rather curious.¹⁶² The district court reasoned that if a record is exempted from disclosure under the public records law, any meeting which involves the contents of that record must also be closed. Otherwise, the court argued, the confidentiality of the record would be lost. Given the number of exemptions from the public records law, this is a potentially far-reaching decision, and it ignores the deliberate choice of the legislature in adopting two separate statutory schemes. As with the public records law, the Florida Supreme Court has not directly confronted the question of whether the judiciary has the power to create public policy exceptions to the open meetings law.

3. *Public Officials*

It is common knowledge that public officials sacrifice much of their personal privacy when they enter the public arena. But public officials also retain a zone of privacy,¹⁶³ and much debate has attended the question of where the line bounding that zone should be drawn.

Two Florida cases have dealt with the question of whether one's name may be placed on an election ballot against one's will. In *Battaglia v. Adams*, the Florida Supreme Court sustained the right of Richard Nixon to remove his name from the 1964 Florida presi-

157. *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974).

158. *Occidental Chem. Co. v. Mayo*, 351 So. 2d 336, 341 n.7 (Fla. 1977); *Canney v. Board of Pub. Instruction*, 278 So. 2d 260 (Fla. 1973) (on rehearing). *Contra*, *State Dep't of Pollution Control v. State Career Serv. Comm'n*, 320 So. 2d 846 (Fla. 1st Dist. Ct. App. 1975).

159. *Bassett v. Braddock*, 262 So. 2d 425 (Fla. 1972).

160. *Occidental Chem. Co. v. Mayo*, 351 So. 2d 336 (Fla. 1977); see 6 FLA. ST. U.L. REV. 199 (1978).

161. *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971); *Board of Pub. Instruction v. Doran*, 224 So. 2d 693 (Fla. 1969).

162. *Marston v. Gainesville Sun Publishing Co.*, 341 So. 2d 783 (Fla. 1st Dist. Ct. App. 1976), *cert. denied*, 352 So. 2d 171 (Fla. 1977).

163. See *Cason v. Baskin*, 20 So. 2d 243, 252 (Fla. 1944) (quoting Warren & Brandeis, *supra* note 15).

dential primary ballot.¹⁶⁴ The court rejected the argument that a public figure automatically waives "any right of privacy in this area" that he may have had."¹⁶⁵ But the court ruled in *Yorty v. Stone* in 1972 that the exercise of that right may be conditioned on the execution of an affidavit that one is not now, and does not intend to become, a candidate.¹⁶⁶ Without that, the court reasoned, there is no invasion of privacy in placing a generally recognized candidate's name on the ballot. In yet another and more recent case, the court held constitutional a law requiring write-in candidates to register, thus eliminating the writing-in of unregistered candidates.¹⁶⁷ The court reasoned that one purpose of the law was to protect the privacy of those who do not wish to be on the ballot.

Unquestionably, the major contemporary debate about privacy and public officials concerns financial disclosure legislation.¹⁶⁸ In *Goldtrap v. Askew*, in 1976, the Florida Supreme Court sustained a financial disclosure statute which required disclosure of sources, but not amounts, of income.¹⁶⁹ While noting that the federal right of privacy does not reach matters of this type, the court observed that, in any event, the state had a "compelling interest" in financial disclosure which would outweigh any privacy interests that could be asserted. It does not appear that the existence of a state constitutional right of privacy was argued in *Goldtrap*, though presumably any such right would likewise have yielded to the compelling state interest.

That same year, the Florida Constitution was amended by popular initiative to provide a more stringent scheme of financial disclosure. Popularly known as the Sunshine Amendment, the new section required public disclosure of sources and amounts of income.¹⁷⁰ In *Plante v. Gonzalez*, several state senators challenged the Sunshine Amendment in federal court, arguing that it swept overbroadly into individual financial affairs, thus offending the federal

164. 164 So. 2d 195 (Fla. 1964).

165. *Id.* at 198.

166. 259 So. 2d 146 (Fla. 1972). The requirement of an affidavit is contained in § 103.101, Florida Statutes (1977). Yorty sought removal without filing an affidavit. Nixon, by contrast, had withdrawn entirely from the 1964 campaign.

167. *Pasco v. Heggen*, 314 So. 2d 1 (Fla. 1975).

168. Compare, e.g., *City of Carmel-by-the-Sea v. Young*, 466 P.2d 225 (Cal. 1970) and *County of Nevada v. MacMillen*, 522 P.2d 1345 (Cal. 1974) with *Stein v. Howlett*, 289 N.E.2d 409 (Ill. 1972), appeal dismissed, 412 U.S. 925 (1973) and *Illinois State Employees Ass'n v. Walker*, 315 N.E.2d 9 (Ill.), cert. denied sub nom. *Trooper's Lodge No. 41 v. Walker*, 419 U.S. 1058 (1974).

169. 334 So. 2d 20 (Fla. 1976).

170. FLA. CONST. art. II, § 8; see Note, *Legislative Efforts to Amend the Florida Constitution: The Implications of Smathers v. Smith*, 5 FLA. ST. U.L. REV. 747, 755 n.40, 781 (1977).

right of privacy.¹⁷¹ In a long and thoughtful analysis, the district court noted that the federal right of privacy does not encompass matters of financial disclosure, thus obviating the need for strict scrutiny of the Sunshine Amendment. Measured by either the rational basis test or the balancing test, the court concluded that the measure was "undeniably constitutional."¹⁷²

On appeal, the Fifth Circuit Court of Appeals affirmed the district court's decision. The court noted that Americans have a constitutional right to privacy, embodied in several of the Bill of Rights amendments and protected by the fourteenth amendment. That right to privacy, the court said, consists of an interest in autonomy or independent decision making, and an interest in avoiding disclosure of personal information.¹⁷³

The court held that a decision not to disclose one's financial affairs is not the type of important, intimate decision protected by the autonomy branch of the right of privacy. Financial disclosure does not remove any alternatives from the decision making process; at most, disclosure may deter some decisions.¹⁷⁴ Moreover, the senators' interest in avoiding disclosure had to be balanced against the interest of the public in deterring corruption and knowing the interests of its elected officials. Since the senators chose to run for office, the court reasoned, they should expect some limit on their privacy.¹⁷⁵

A final area of inquiry is the conflict between the individual right of privacy and the public right of access to divorce proceedings involving public officials. In *English v. McCrary*, a three-justice plurality addressed the question, as did two dissenting justices.¹⁷⁶ Though the plurality opinion was later withdrawn, it is nevertheless worthwhile to consider, for it provides some insight into the views of several members of the court.

In *English*, a newspaper reporter was excluded from the divorce proceeding of an elected State's attorney. The trial judge had closed the hearing on the ground that it was a "private matter."¹⁷⁷ The reporter then sought review, which was decided adversely to him on an issue not relevant here.¹⁷⁸

171. 437 F. Supp. 536 (N.D. Fla. 1977), *aff'd*, No. 77-3109 (5th Cir. June 30, 1978).

172. 437 F. Supp. at 540.

173. No. 77-3109.

174. *Id.*

175. *Id.*

176. No. 49,039 (Fla. May 6, 1977), *modified on denial of rehearing*, 348 So. 2d 293 (Fla. 1977). Only six of the seven justices considered the case.

177. 348 So. 2d at 299 n.1. (England, J., dissenting).

178. The reporter had brought a writ of prohibition to restrain the judge from proceeding with the hearing. The supreme court eventually denied relief on the ground that he had

Justice Karl wrote for the plurality. He rejected "the assumption that the public and the press have a legitimate interest in all civil litigation where an elected public official is a party," and noted there had been no showing that "the matter being litigated would, in some way, affect official duties or otherwise involve information to which the public would be entitled."¹⁷⁹ Karl and the plurality placed substantial reliance on the reasoning in *Time, Inc. v. Firestone*, in which the United States Supreme Court observed that resort to the judicial process for a divorce could not be deemed truly voluntary.¹⁸⁰ Thus, Justice Karl reasoned, "a dissolution proceeding is not always a 'public controversy' that automatically nullifies the parties' right to privacy, even though the marital difficulties may be of interest to some members of the public."¹⁸¹

Under Justice Karl's plurality view, closure would not be available of right. The determination of whether to close a civil proceeding would be made on a case-by-case basis, so that the power to close judicial proceedings would "never be permitted to hide official misconduct of any kind, regardless of the status of the parties."¹⁸² Karl argued that the right to know is "not absolute and must be placed in juxtaposition and balanced with other fundamental rights such as the right to a fair trial and to privacy."¹⁸³ And, though the plurality did not say so, part of the balancing must encompass the fact that usually only one of the two marriage partners seeking the divorce is a public official—a point often overlooked in public figure cases of this type.

brought the wrong writ, despite the fact that two constitutional provisions forbade such a ruling. *See id.* at 299; FLA. CONST. art. I, § 21; *id.* art. V, § 2(a).

Subsequently, the supreme court adopted a rule which provides an expedited procedure for review of closure orders, though the procedure does not differ substantially from that used in *English*. For the current procedure, see *In re Proposed Fla. Appellate Rules*, 351 So. 2d 981, 990-91 (Fla. 1977); FLA. R. APP. P. 9.100(d). Additional procedural suggestions were made in *State ex rel. Miami Herald Publishing Co. v. McIntosh*, 340 So. 2d 904, 911-12 (Fla. 1977) (as modified on denial of rehearing) (Sundberg, J., concurring).

179. No. 49,039, slip op. at 8. The court correctly noted that there is no constitutional requirement for public proceedings in civil litigation; the guaranty of a "speedy and public trial" pertains to criminal cases. *See* U.S. CONST. amend. VI; FLA. CONST. art. I, § 16. Even in criminal matters, nonpublic proceedings are sometimes permissible to assure a fair trial. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). It is not clear whether the public trial provision is a right personal to, and exercisable only by, the defendant, or whether it is the right of the public at large.

In civil matters, certain proceedings, such as adoption, are closed by statute. 348 So. 2d at 301 n.10.

180. No. 49,039, slip op. at 9-10 (quoting *Time, Inc. v. Firestone*, 424 U.S. 448 (1976)).

181. *Id.* at 9.

182. *Id.* at 8 n.2.

183. *Id.* at 10.

Justices England and Sundberg dissented.¹⁸⁴ They argued that no reason had been given why the hearing could not be held in public. They said that the preference of the parties for privacy was not a sufficient reason to close a hearing. Rather, the parties should have to show that publicity would impair their right to a fair trial. Thus, under the dissenting view, the relational privacy of marriage deserved no special consideration.¹⁸⁵

Because *English* was ultimately decided on other grounds, the question of whether and under what conditions a court may close civil proceedings involving a public official remains unresolved.

D. Privacy in the Judicial Process

The potential for infringement of privacy in litigation is very great. Aside from constitutional and statutory privileges, there is no general privilege to refuse to be a witness, or to disclose any matter, or to produce documents or objects.¹⁸⁶ Nor is a general privilege afforded on grounds of privacy. It thus falls to legislative and court action to protect privacy interests.

Certain protections of privacy are well-settled. Evidentiary privileges, for example, safeguard the relationship of husband and wife, psychotherapist and patient, and priest and penitent.¹⁸⁷ The privacy of one's person is given limited recognition in the discovery rules pertaining to physical examinations, for an examination may be ordered only for good cause.¹⁸⁸ And there is a right to refuse an examination without penalty for contempt, though the non-contempt sanctions are compulsive nonetheless.¹⁸⁹ Medical records enjoy limited statutory protection against discovery.¹⁹⁰

Beyond these basic ground rules, the protection of privacy in judicial proceedings is an unsettled matter, often depending on discretionary protective measures in individual cases. The following sections explore some of the basic issues.

184. 348 So. 2d at 299.

185. The "fair trial considerations" urged by the dissent are certainly legitimate criteria for closing a hearing and undoubtedly are constitutionally compelling in civil as well as criminal proceedings. But the inquiry does not stop there. The dissent fails to explain why "fair trial considerations" should be the *only* criterion for closure. This is certainly not the criterion by which the legislature opted to close certain proceedings involving adoption, child custody, and the like. The dissent simply dismisses, without analysis, the relational privacy of marriage as being the "mere preference of the parties." *Id.* at 300-01.

186. FLA. STAT. § 90.501 (1977).

187. *Id.* §§ 90.503-.505. Other privileges, such as lawyer-client and trade secrets, *id.* §§ 90.502, .506, are recognized but protect confidential relationships which do not necessarily involve privacy.

188. FLA. R. CIV. P. 1.360. *Gasparino v. Murphy*, 352 So. 2d 933 (Fla. 2d Dist. Ct. App. 1977) outlines the elements of "good cause" in a civil proceeding.

189. FLA. R. CIV. P. 1.380(b)(2).

190. FLA. STAT. § 458.16 (1977).

1. *Discovery*

Although the discovery rules relating to physical examinations are clear, the rules are less certain when a protective order is sought on the ground that discovery would invade privacy. In two reported alimony cases decided by district courts of appeal, an ex-wife sought discovery of financial information about the ex-husband's current wife. In one case, an objection to an interrogatory was sustained on grounds of relevancy without reaching the privacy issue.¹⁹¹ In an earlier decision, an ex-wife sought the joint income tax return of the ex-husband and his current wife. The privacy issue was avoided by giving the ex-husband an alternative means of supplying the financial information.¹⁹²

In *Springer v. Greer*, in 1976, two plaintiffs sought discovery of extensive information about prescriptions for addictive drugs written by the defendant physician over a period of several years.¹⁹³ They sought the prescription records of five pharmacists as well as the names and addresses of all persons for whom the defendant had prescribed the named drugs. The Fourth District Court of Appeal ordered disclosure of the total number of prescriptions written, but not the identities of the patients. The trial court was given the responsibility of supervising discovery so as to protect privacy and prevent harassment.

In *News-Press Publishing Co. v. State*, in 1977, the desire to protect the family of a crime victim from publicity was held an insufficient reason for the sealing of depositions.¹⁹⁴ The depositions were sealed during pendency of a murder case. After a guilty plea the press sought access. The Second District Court of Appeal held that sealing records would be proper to protect the right to a fair trial, to protect life, or for other compelling reasons, but not "to protect the victim's family from exposure of the details of what was apparently a heinous crime"¹⁹⁵ The case was remanded for a more specific statement of the trial court's reasons for sealing the depositions.

2. *Sealing or expungement of records*

One year earlier, in *Miami Herald Publishing Co. v. Collazo*, a trial court sealed a settlement agreement between the City of Miami

191. *Schneider v. Schneider*, 348 So. 2d 612 (Fla. 4th Dist. Ct. App. 1977).

192. *Ramona v. Ramona*, 223 So. 2d 569 (Fla. 3d Dist. Ct. App. 1969).

193. 341 So. 2d 212 (Fla. 4th Dist. Ct. App. 1976), *appeal dismissed*, 351 So. 2d 406 (Fla. 1977). Plaintiffs alleged that defendant had engaged in a conspiracy to cause addiction among his patients.

194. 345 So. 2d 865 (Fla. 2d Dist. Ct. App. 1977).

195. *Id.* at 867.

and a private litigant who had sued for police misconduct.¹⁹⁶ The settlement had been reached during trial and approved by the court in chambers. It was sealed because "the amount of money involved was no one's business but those of the parties involved" and in order to avoid affecting certain other pending claims against the city.¹⁹⁷ The Third District Court of Appeal held that the right to know clearly outweighed the personal preference of the litigants, particularly when one of the parties was a governmental entity.

The Florida Supreme Court has twice considered the issue of expungement of arrest records. In *Mulkey v. Purdy*, the court held that the judiciary was without power to order expungement, absent either legislative authority or evidence that the law enforcement agency had abused its statutory discretion in making the record in the first instance.¹⁹⁸ Subsequently, the legislature provided for expungement for certain first offenders.¹⁹⁹ The supreme court then held that the statute constituted an unconstitutional encroachment on judicial power and substituted a procedure by which trial courts collect and seal—rather than destroy—records for which expungement is sought.²⁰⁰

3. *The Power to Close Judicial Proceedings*

As indicated in section IVC, closure of judicial proceedings is a highly controversial procedure, and it is not at all clear to what extent closure will be allowed to protect personal privacy.

There is no constitutional requirement that civil litigation be public, and the guarantee of a speedy and public trial in criminal cases is arguably a right personal to the defendant rather than a right belonging to the public at large.²⁰¹ The first amendment has been held not to confer a right of access where it does not otherwise

196. 329 So. 2d 333 (Fla. 3d Dist. Ct. App.), *cert. denied*, 342 So. 2d 1100 (Fla. 1976).

197. 329 So. 2d at 335, 338.

198. 234 So. 2d 108 (Fla. 1970), *aff'g* 228 So. 2d 132 (Fla. 3d Dist. Ct. App. 1969). The supreme court was seemingly oblivious to the plight of the petitioner, who had been placed on six months' probation for petit larceny at age 17. Eight years later he sought expungement after Pan American World Airways promised to hire him—if the records were expunged. Although the policy and constitutional questions are substantial, the court's position rings hollow when one recalls its contrary resolution of the legislative power issue in *Cason*, discussed in section IVA *supra*, and the court's solicitude for citizen Nixon's privacy in *Battaglia*, discussed in section IVC *supra*. Perhaps the key to the decision lies in its applause for a New York court which had denied "a petition by a group of students to have their arrests expunged from the record when charges against them were dropped . . ." 234 So. 2d at 110 (citation omitted).

Justice Ervin's dissent took a broader view of the court's equitable powers. *Id.* at 111.

199. See FLA. STAT. § 901.33 (1977).

200. *Johnson v. State*, 336 So. 2d 93 (Fla. 1976) (4-3 decision); see FLA. R. CRIM. P. 3.692.

201. See note 179 *supra*.

exist.²⁰² Even in criminal cases, closure is only rarely authorized in order to protect the defendant's right to a fair trial from impairment by pretrial publicity.²⁰³

It is well-settled that civil proceedings may be closed in some circumstances. Florida courts thus far have not questioned the validity of statutes requiring or authorizing closure of proceedings relating to unwed mothers, adoption, paternity, custody, or placement of children.²⁰⁴ Indeed, the statutory provisions are some evidence of a legislative concern for safeguarding privacy, for that is the interest protected.

The courts also appear to agree that they have the equitable power to close hearings in addition to those made confidential by statute.²⁰⁵ Thus the question for the courts has not been whether in principle hearings can be closed, but rather, under what circumstances, if any, the public right to know is outweighed by the individual right of privacy (or some other strong, countervailing interest). The recent cases which have presented the question involved divorce. Given the outcome in *English v. McCrary*, discussed more fully in section IVC, the present view of the Florida Supreme Court on the subject is in doubt.²⁰⁶

The issue confronted by the supreme court in *English* was considered previously by the Fourth District Court of Appeal in *State ex rel. Gore Newspapers Co. v. Tyson*.²⁰⁷ There the press sought access to the divorce proceedings of comedian Jackie Gleason. Mrs. Gleason moved to close the hearing, a motion in which Mr. Gleason joined. The trial court closed the proceedings, but the district court of appeal reversed.

The appellate opinion in *Tyson* rests on the theory that the Gleason

202. See *Houchins v. KQED, Inc.*, 46 U.S.L.W. 4830 (U.S. June 26, 1978); *Pell v. Procunier*, 417 U.S. 817 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Shevin v. Sunbeam Television Corp.*, 351 So. 2d 723 (Fla. 1977), *appeal filed*, 46 U.S.L.W. 3557 (U.S. Mar. 7, 1978).

203. *State ex rel. Miami Herald Publishing Co. v. McIntosh*, 340 So. 2d 904 (Fla. 1977).

204. FLA. STAT. § 39.09 (1)(b) (unwed mothers, custody, or placement), 63.162 (adoption), 742.031 (paternity) (1977); see *English v. McCrary*, 348 So. 2d at 301 & n.10 (England, J., dissenting).

205. The withdrawn plurality opinion in *English v. McCrary*, expressing the views of three justices, so stated. No. 49,039, slip op. at 7; *accord*, 348 So. 2d at 300-01 (England & Sundberg, JJ., dissenting); *State ex rel. English v. McCrary*, 328 So. 2d 257 (Fla. 1st Dist. Ct. App. 1976); *State ex rel. Gore Newspapers Co. v. Tyson*, 313 So. 2d 777 (Fla. 4th Dist. Ct. App. 1975), *overruled on other grounds*, *English v. McCrary*, 348 So. 2d 293 (Fla. 1977).

206. See Section IVC(3) *supra*. Chief Justice Overton did not express a view on the privacy issue in *English*, and Justice Boyd did not participate. Justice Karl has since left the court.

207. 313 So. 2d 777 (Fla. 4th Dist. Ct. App. 1975), *overruled on other grounds*, *English v. McCrary*, 348 So. 2d 293 (Fla. 1977).

sons were public figures and, therefore, their divorce was a matter of great public interest. That view cannot stand in light of *Time, Inc. v. Firestone*.²⁰⁸ The *Tyson* court suggested that it might be appropriate in some circumstances to close such a divorce proceeding, or that of a nonpublic figure, but indicated that the desire to protect individual privacy would not be a sufficient reason.²⁰⁹ The district court of appeal was divided on the question.

4. Jurors

In *Smith v. Portante*, the Florida Supreme Court expressed concern about the potential for invasion of the privacy of prospective jurors.²¹⁰ A statute authorized questionnaires to be sent to prospective jurors, the answers to which were meant to facilitate voir dire. Response was compulsory, but the statute did not limit the subjects of inquiry. The court invalidated the statute as an unlawful delegation of legislative authority. The matter is now regulated by rule.²¹¹

5. Financial Disclosure and Open Meetings

Financial disclosure for judges, like other public officers, is regulated by the Sunshine Amendment—article II, section 8, of the Florida Constitution—and by the Code of Judicial Conduct.²¹² Proceedings of judicial nominating commissions may be public or nonpublic at the option of each commission.²¹³ Proceedings of the Judicial Qualifications Commission are confidential until there is a finding of probable cause and a filing of formal charges.²¹⁴

E. Privacy and Autonomy: The Right to Decide

One major aspect of privacy, from the time of Warren and Brandeis to the present, has been the right to selective disclosure—the right to determine whether or not information about oneself will be disclosed to others. The foregoing sections have been almost exclusively concerned with this “disclosural” privacy.

A second major aspect of privacy is autonomy—the right to make fundamental decisions about one’s own life. It may be that autonomy—the right to decide—is the basic characteristic of privacy, for selective disclosure also involves decision: the decision whether or

208. 424 U.S. 448 (1976).

209. 313 So. 2d at 785-87. The court placed particular weight on the public right to know what occurs in its courtrooms and on Wigmore’s observation that public scrutiny improves the quality of justice.

210. 212 So. 2d 298 (Fla. 1968).

211. FLA. R. CIV. P. 1.431(a); FLA. R. CIV. P. FORMS 1.983, 1.984.

212. FLA. CODE OF JUDICIAL CONDUCT Canon 6.

213. See *In Re Advisory Opinion to the Governor*, 276 So. 2d 25 (Fla. 1973); 1973 FLA. OP. ATT’Y GEN. 073-348.

214. FLA. CONST. art. V, § 12.

not to disclose personal information. From that standpoint, autonomy is fundamental. Selective disclosure is a special case, albeit a very large special case.²¹⁵

The following sections deal primarily with the autonomy aspect of privacy rather than with selective disclosure.

1. *The Griswold Constellation*

The federal right of privacy deals with issues of autonomy and has, at least so far, excluded issues of disclosure. The *Griswold* constellation—*Griswold v. Connecticut*²¹⁶ and its progeny—could be said to establish the right of family relation, for those cases protect the right to make fundamentally important decisions about marriage, contraception, procreation, abortion, childrearing, and education.²¹⁷ Where this federal right of privacy is involved, it is, naturally, controlling.

Prior to the abortion decisions of the United States Supreme Court,²¹⁸ the Florida Supreme Court invalidated the state abortion statutes.²¹⁹ In *State v. Barquet*, the Florida court struck statutes punishing abortion except as necessary to preserve the mother's life or advised to be so by two physicians, though it retained the common law misdemeanor penalty.²²⁰ The privacy issue was raised, but the court did not reach it, preferring instead to rely on the ground of vagueness. Later Florida abortion decisions have been based on the federal right of privacy,²²¹ though the courts have been faced with questions about the impact of the abortion right on state-created rights of an unborn child.²²²

The federal right of privacy was construed by the Fourth District Court of Appeal in *Springer v. Greer*, a case involving a physician's prescriptions for addictive drugs.²²³ There the court relied on the federal right of privacy in preventing disclosure of patients' names

215. See Beardsley, *supra* note 31.

216. 381 U.S. 479 (1965).

217. See section III *supra*.

218. *Doe v. Bolton*, 410 U.S. 179 (1973); *Roe v. Wade*, 410 U.S. 113 (1973).

219. *State v. Barquet*, 262 So. 2d 431 (Fla. 1972). See generally *Walsingham v. State*, 250 So. 2d 857 (Fla. 1971).

220. 262 So. 2d 431 (Fla. 1972).

221. *Wright v. State*, 351 So. 2d 708 (Fla. 1977) (constitutionality of terms of current abortion law); *Jones v. Smith*, 278 So. 2d 339 (Fla. 4th Dist. Ct. App. 1973), *cert. denied*, 415 U.S. 958 (1974) (natural father cannot restrain mother from having abortion).

222. *Day v. Nationwide Mutual Ins. Co.*, 328 So. 2d 560 (Fla. 2d Dist. Ct. App. 1976) (fact that mother could terminate pregnancy does not obviate cause of action for prenatal injuries if child is carried to term); *Shinall v. Pergeorelis*, 325 So. 2d 431 (Fla. 1st Dist. Ct. App. 1975) (mother's right to terminate pregnancy does not confer on her the right to contract away the child's statutory right to natural father's support, if carried to term).

223. 341 So. 2d 212 (Fla. 4th Dist. Ct. App. 1976), *appeal dismissed*, 351 So. 2d 406 (Fla. 1977); see section IVD(1) *supra*.

and prescriptions, while permitting the collection of aggregate statistics about the total number of prescriptions the defendant doctor had written. The United States Supreme Court's later decision in *Whalen v. Roe* leaves unanswered the extent to which the physician-patient relationship is implicated in the federal right of privacy, as well as the extent to which the federal right of privacy protects disclosure rather than decisionmaking.²²⁴

The federal right of privacy also anchored the decision in *Franklin v. White Egret Condominium, Inc.*, holding that condominium agreements which exclude children from residency are unconstitutional.²²⁵ The Fourth District Court of Appeal reasoned that such agreements interfere unreasonably with family relationships and childrearing, thus violating the federal right of privacy.

2. *Helmets, Hair, and Neckties*

Once one leaves the sector specifically protected by the federal right of privacy, the *Griswold* line of cases is useful only by analogy. The right of privacy, if any, is protected by the state, rather than the federal, constitution. Two areas in which privacy challenges frequently have been brought are regulations relating to one's dress and regulations requiring the use of safety devices.

In *State v. Eitel*, a motorcyclist argued that he had a "right to be let alone" by the state, insofar as state law required motorcyclists to wear helmets.²²⁶ Citing John Stuart Mill,²²⁷ Eitel maintained that the statute was designed to protect the cyclist and that the cyclist therefore had a right to determine whether or not he wished to be protected. The court responded with a view which, because of the philosophical difficulties it presents, is rarely directly expressed: "that society has an interest in the preservation of the life of the individual for his own sake."²²⁸ The court also quoted Mill's observation that "[n]o person is an entirely isolated being; it is impossible for a person to do anything seriously or permanently hurtful to himself without mischief reaching at least to his near connections, and often far beyond them."²²⁹ The statute was sustained.

224. 429 U.S. 589 (1977).

225. No. 76-1535 (Fla. 4th Dist. Ct. App. Aug. 9, 1977), *petition for rehearing denied with opinion* (Fla. 4th Dist. Ct. App. May 31, 1978).

226. *State v. Eitel*, 227 So. 2d 489 (Fla. 1969) (Mann, Dist. Ct. App. J., sitting by designation).

227. J. MILL, *ON LIBERTY* (Bobbs-Merrill ed. 1956).

228. *State v. Eitel*, 227 So. 2d 489, 491 (Fla. 1969) (footnote omitted) (citing as an example the fact that suicide was a common law crime). The difficulty with the court's view is that it permits the state to substitute its judgment for that of the individual regarding what is in the individual's own best interest, a notion that cuts against generally held conceptions of individual liberty.

229. *Id.* (quoting J. MILL, *supra* note 227, at 97).

Another court reached a different result in Florida's leading case on hair length regulations, *Conyers v. Glenn*.²³⁰ There the Second District Court of Appeal relied in part on the federal right of privacy, saying that "the one clear consequence of *Griswold* is that some showing of overriding public necessity is a necessary predicate to state action interfering with the freedom of the individual."²³¹ The court reasoned that unless such necessity was shown, "this part of the child's nurture rests with the parent"²³²—who in *Conyers* had given permission for the student to wear his hair long. Noting that a "clear majority of the Chief Justices of the United States would be ineligible by the Pinellas Board's standards to matriculate at Clearwater High School,"²³³ the court found that no overriding public necessity was shown and the regulation was void.

A more recent case of this kind involved contempt citations against an attorney who preferred to wear a medallion instead of a necktie for appearances in court. The contempt convictions were affirmed in two district court of appeal decisions characterized primarily by failure even to identify the privacy issue.²³⁴ It is plain that the attorney was being punished primarily for the manner in which he refused to wear a tie rather than for the fact that he failed to do so.²³⁵

3. Marijuana

The right of privacy has, in Alaska, served as the basis for invalidation of state laws against the possession of marijuana.²³⁶ Two challenges to a similar law have been considered by the Florida Supreme Court. Both have been unsuccessful, but others are pending at this writing.

In 1969 in *Borras v. State*,²³⁷ the appellant argued that the state could not prohibit use of marijuana in the privacy of the home,

230. 243 So. 2d 204 (Fla. 2d Dist. Ct. App. 1971) (Mann, J.).

231. *Id.* at 206.

232. *Id.* at 207.

233. *Id.*

234. *Sandstrom v. State*, 309 So. 2d 17 (Fla. 4th Dist. Ct. App. 1975), writ discharged for want of juris., 336 So. 2d 572 (Fla. 1976); *Sandstrom v. State*, 311 So. 2d 804 (Fla. 3d Dist. Ct. App. 1975) (per curiam affirmance citing Fourth District opinion), writ discharged for want of juris., 336 So. 2d 572 (Fla. 1976).

235. See *Sandstrom v. State*, 336 So. 2d 572, 573 n.5 (Fla. 1976) (England, J., dissenting); *Sandstrom v. State*, 309 So. 2d 17, 22-23 (Fla. 4th Dist. Ct. App. 1975). *Sandstrom* had appeared without incident in numerous courts, including the Florida Supreme Court, in the same attire. 336 So. 2d at 578 (Boyd, J., dissenting). Ironically, the validity of the contempt citations was defended in the Florida Supreme Court by Assistant Attorney General C. Marie Bernard—who was wearing a tie. *Id.* at 578-79. Justice England, in a dissent joined by Justices Boyd and Adkins, dealt with the privacy issue in a substantial way. *Id.* at 576-78.

236. *Ravin v. State*, 537 P.2d 494 (Alaska 1975).

237. 229 So. 2d 244, 246 (Fla. 1969).

reasoning by analogy to *Stanley v. Georgia*.²³⁸ *Stanley*, however, had been decided on the first amendment right to consume ideas. The *Stanley* court distinguished laws prohibiting possession of narcotics, firearms, and stolen property. Thus, the Florida Supreme Court concluded that marijuana was harmful to the individual and to society and sustained the validity of the statute.

The court revisited the marijuana issue in 1977 in *Laird v. State*.²³⁹ There it was urged that the marijuana law violated the right of privacy insofar as the law prohibited noncommercial possession or use in a private home. The court again canvassed the federal decisions and concluded that the federal right of privacy did not extend so far. As it did in *Miami Herald Publishing Co. v. Marko*,²⁴⁰ the court viewed privacy solely in a federal context. It distinguished the Alaska decision, *Ravin v. State*,²⁴¹ because *Ravin* rested on an express state right of privacy in the Alaska Constitution.²⁴² The next logical question was whether a right of privacy is implicit in the Florida Constitution—a point the court failed to address.²⁴³

The *Laird* court went on to observe, however, that the record was inadequate to determine whether there was a rational basis for the proscription of private marijuana possession. The court left open "the possibility of making such a determination on a properly-developed record wherein both sides have had an opportunity to present evidence of competing expert authorities before an impartial tribunal."²⁴⁴ The court noted that the rational basis standard would be used rather than the compelling state interest test, since there was no fundamental right to smoke marijuana. This invitation has been accepted in several cases now pending before the supreme court on a conventional rational basis, rather than privacy, challenge.²⁴⁵

4. *Sexual Behavior*

The Florida Supreme Court has on several recent occasions considered challenges to statutes regulating sexual behavior. The keys to the court's analysis have, as in the abortion cases, been vague-

238. 394 U.S. 557 (1969).

239. 342 So. 2d 962 (Fla. 1977).

240. 352 So. 2d 518 (Fla. 1977).

241. 537 P.2d 494 (Alaska 1975).

242. 342 So. 2d at 965.

243. It is not clear from the opinion whether the court was asked to recognize a right of privacy under an existing provision of the Florida Constitution. If it was, the invitation was ignored. Cf. *Breese v. Smith*, 501 P.2d 159 (Alaska 1972) (Alaska Supreme Court found a right "to be let alone" in the Alaska Constitution).

244. 342 So. 2d at 965.

245. *State v. Leigh*, No. 53,339 (Fla., filed Feb. 6, 1978); *Bourassa v. State*, No. 51,926 (Fla., filed June 27, 1977); *Hamilton v. State*, No. 51,812 (Fla., filed June 9, 1977).

ness, overbreadth, and statutory construction. But privacy challenges have on occasion been addressed.

The leading case is *Franklin v. State*, in which the court held void for vagueness an 1868 statute prohibiting "the abominable and detestable crime against nature."²⁴⁶ The court alluded to "the invasion of private rights by state intrusion,"²⁴⁷ but privacy analysis played no part in the decision. The court imposed on the defendants a misdemeanor penalty for committing an "unnatural and lascivious act." The latter statute has been deemed not vague, and its enforcement has been held not to invade privacy.²⁴⁸

Privacy has been held not to be infringed by a prosecution for engaging in sexual intercourse in the presence of one's own child,²⁴⁹ nor by Bar inquiry into, and disbarment for, sexual intercourse with a minor child.²⁵⁰ Privacy has not been involved in recent cases reviewing statutes regulating sexual behavior in public or commercial settings.²⁵¹

There appears to be no case posing directly the question of whether the state has the power to punish sexual behavior by consenting adults in the home or other private place. *Franklin* involved consenting adults, but the conduct took place in a car parked in a public place. The language in *Franklin* suggests that such acts could be forbidden under a clearly drawn statute,²⁵² but the privacy issue was not directly considered.

The Florida Supreme Court has recently held that sexual preference is not a basis for excluding an otherwise qualified candidate from admission to the Bar.²⁵³ The court concluded that there was no rational connection between a homosexual orientation and one's fitness or lack of fitness to practice law. The court noted that there must be "a substantial connection between a member's antisocial behavior and his ability to otherwise carry out his professional responsibilities as an attorney. Otherwise, *The Bar will be virtually*

246. 257 So. 2d 21 (Fla. 1971).

247. *Id.* at 23.

248. *Witherspoon v. State*, 278 So. 2d 611 (Fla. 1973).

249. *Chesebrough v. State*, 255 So. 2d 675 (Fla. 1971). The couple showed their child "how babies are made," and were charged under a statute prohibiting "any lewd or lascivious act in the presence of [a] child [under the age of fourteen]." *Id.* at 676.

250. *Florida Bar v. Hefty*, 213 So. 2d 422 (Fla. 1968) (by implication). The majority opinion did not directly address the privacy issue, but Justice Ervin dealt with it in his dissent.

251. *State v. Bales*, 343 So. 2d 9 (Fla. 1977) (statute regulating massage parlors); *Campbell v. State*, 331 So. 2d 289 (Fla. 1976) (statute forbidding "open and gross lewdness and lascivious behavior" applied to conduct in a bar).

252. 257 So. 2d at 23.

253. *Florida Bd. of Bar Examiners Re: Eimers*, 358 So. 2d 7 (Fla. 1978).

unfettered in its power to censor the private morals of Florida Bar members, regardless of any nexus between the behavior and the ability to responsibly perform as an attorney.'"²⁵⁴

The court reserved the question of whether its position would differ "where evidence establishes that an individual has actually engaged in homosexual acts."²⁵⁵ The record was silent on that subject, and the court did not remand for additional information.²⁵⁶ When the question arises, as inevitably it must, the court will need to face the question whether the state may regulate private consensual sexual behavior between adults.²⁵⁷

F. Privacy in the Florida Constitution

Privacy is an interest protected by various provisions of the United States Constitution, including the first, third, fourth, fifth, eighth, and fourteenth amendments.²⁵⁸ Privacy is just as clearly implicated in the counterpart provisions of the Florida Constitution.²⁵⁹ Although privacy has been directly or indirectly involved in a few state constitutional cases, the vast majority of Florida constitutional privacy litigation has revolved around the prohibition against unreasonable searches and seizures. The notable exception is the recent decision of *Byron Harless, Schaffer, Reid & Associates, Inc. v. State ex rel. Schellenberg*, in which the First District Court of Appeal recognized a right of privacy in the due process clause of the Florida Constitution.²⁶⁰

1. Unreasonable Searches and Seizures

In the 1960's, the United States Supreme Court declared that the

254. *Id.* at 10 (emphasis supplied by the court). The quotation is from Chief Justice Ervin's concurrence in *Florida Bar v. Kay*, 232 So. 2d 378 (Fla. 1970), a case involving disbarment for public homosexual conduct. Justice Ervin had previously urged that any inquiry by the Bar into the morals of attorneys constituted an invasion of privacy. *Florida Bar v. Hefty*, 213 So. 2d 422, 425 (Fla. 1968). In *Kay*, Justice Ervin again explored the privacy issue and suggested guidelines to limit Bar discipline to proper boundaries. The *Kay* concurrence was quoted extensively in *Eimers*. The court in *Eimers* noted, however, that standards for Bar admission may differ from standards for disbarment, 358 So. 2d at 9 n.1, a distinction defensible only to those already admitted to the Bar.

255. *Id.* at 8.

256. Justice Boyd urged it to do so. *Id.* at 10 (Boyd, J., dissenting).

257. The question could, as in *Eimers*, be addressed in terms of the relationship between sexual behavior and performance as an attorney. It seems unlikely, however, that the court would endorse behavior deemed illegal. The next question, therefore, would be whether the state may regulate private consensual sexual behavior between adults.

258. See notes 23, 24, & 26 and accompanying text *supra*.

259. FLA. CONST. art. I, §§ 2 (basic rights), 3 (religious freedom), 4 (freedom of speech and press), 5 (right to assemble), 9 (due process), 12 (searches and seizures), 17 (excessive punishments).

260. No. DD-30 (Fla. 1st Dist. Ct. App. June 1, 1978).

primary purpose of the federal protection against unreasonable searches and seizures "is the protection of privacy rather than property"²⁶¹ and began to focus on one's "reasonable expectation of privacy" in deciding the scope of fourth amendment protection.²⁶² A plethora of state court decisions since then have differentiated those areas in which one has a reasonable expectation of privacy from those areas in which one does not.²⁶³ Numerous other decisions have examined the reasonableness of searches and seizures under a variety of circumstances.²⁶⁴ While occasional search-and-seizure cases raise constitutional issues of great magnitude,²⁶⁵ most recent decisions have simply applied settled principles to particular facts.

2. *The 1968 Constitution: Unreasonable Interception of Private Communications*

In 1968, Florida expanded the prohibition against unreasonable searches and seizures to protect "against the unreasonable interception of private communications by any means"²⁶⁶ Article I, section 12, went on: "No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing . . . the communication to be intercepted" Finally, the 1968 revision provided that "[a]rticles or information obtained in violation of this right shall not be admissible in evidence."

In adopting these changes, Florida became one of ten states to deal with privacy expressly in the state constitution.²⁶⁷ The new protection of privacy of communications made a dramatic difference in Florida decisions relating to wiretapping. Although one Florida court had, prior to 1968, held that wiretapping was unconstitutional, the ruling was rendered entirely ineffective by the simultaneous holding that one had a right to listen in on a party line or an

261. *Warden v. Hayden*, 387 U.S. 294, 304 (1967) (citations omitted).

262. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

263. See, e.g., *Moore v. State*, 355 So. 2d 1219 (Fla. 1st Dist. Ct. App. 1978) (public restroom stall); *Miranda v. State*, 354 So. 2d 411 (Fla. 3d Dist. Ct. App. 1978) (crawfish boat); *Huffer v. State*, 344 So. 2d 1332 (Fla. 2d Dist. Ct. App. 1977) (hothouse).

264. See, e.g., *Altman v. State*, 335 So. 2d 626 (Fla. 2d Dist. Ct. App. 1976) (inventory search); *Stephenson v. Department of Agriculture & Consumer Servs.*, 329 So. 2d 373 (Fla. 1st Dist. Ct. App.), *aff'd*, 342 So. 2d 60 (Fla. 1976) (administrative search); *Long v. State*, 310 So. 2d 35 (Fla. 2d Dist. Ct. App. 1975) (drug overdose).

265. See, e.g., *Tsavaris v. Scruggs*, 360 So. 2d 745 (Fla. 1977), *rehearing denied*, *id.* (Fla. 1978). A fascinating case, *Tsavaris* involves the relationship between the prohibition of unreasonable searches and seizures and the prohibition of compelled testimony when one's personal papers are subpoenaed. This is the juncture, as *Boyd v. United States* put it, where "the Fourth and Fifth Amendments run almost into each other." 116 U.S. 616, 630 (1886).

266. FLA. CONST. art. I, § 12.

267. See *Toward a Right of Privacy*, *supra* note 1, at 690, 721-24.

extension phone.²⁶⁸ The 1968 measure, augmented by a strong wire-tapping statute,²⁶⁹ has led to strict judicial scrutiny of electronic surveillance and exclusion of improperly obtained evidence.²⁷⁰

This constitutional provision was examined in detail in *Toward a Right of Privacy*²⁷¹ and only the basic features will be outlined here. The constitutional measure applies only to government-conducted surveillance, not to private action. The existence of the constitutional provision has been taken into account in civil cases, however, and has evidently influenced the courts to take a severe view of privately conducted wiretapping. Moreover, the wiretapping statute forbids privately conducted surveillance without the consent of both parties to the communication.²⁷² The protection afforded by the constitutional and statutory measures substantially exceeds that provided by the federal counterparts.

The 1968 constitutional exclusionary rule provides that illegally obtained articles or information "shall not be admissible in evidence." The exclusionary provision does not differentiate between admissibility in criminal, civil, or administrative proceedings. In the 1920's, Florida adopted the exclusionary rule by judicial decision.²⁷³ The 1968 constitutional exclusionary rule has sometimes

268. *Griffith v. State*, 111 So. 2d 282 (Fla. 1st Dist. Ct. App.), *cert. denied*, 114 So. 2d 6 (Fla. 1959). Party-line or extension phone eavesdropping was apparently the universal method of electronic eavesdropping in that period. See *Chacon v. State*, 102 So. 2d 578, 585 (Fla. 1958) (on rehearing en banc); *Perez v. State*, 81 So. 2d 201 (Fla. 1955).

269. FLA. STAT. ch. 934 (1977).

270. See *State v. Walls*, 356 So. 2d 294 (Fla. 1978); *In Re Grand Jury Investigation* (Frank Cobo), 287 So. 2d 43 (Fla. 1973); *Tollett v. State*, 272 So. 2d 490 (Fla. 1973); *Horn v. State*, 298 So. 2d 194 (Fla. 1st Dist. Ct. App. 1974), *cert. denied*, 308 So. 2d 117 (Fla. 1975); *Markham v. Markham*, 265 So. 2d 59 (Fla. 1st Dist. Ct. App. 1972), *aff'd*, 272 So. 2d 813 (Fla. 1973).

271. See *Toward a Right of Privacy*, *supra* note 1, at 721-24.

272. Interceptions for law enforcement purposes require the consent of only one party.

The requirement that both parties consent to interception of a private communication survived an unusual challenge in *Shevin v. Sunbeam Television Corp.*, 351 So. 2d 723 (Fla. 1977), *appeal filed*, 46 U.S.L.W. 3557 (U.S. Mar. 7, 1978). Representatives of the news media argued that they had a first amendment right to gather the news, which right was unconstitutionally infringed by the statute. They sought to record conversations during investigative reporting without revealing to the interviewees that the recording was taking place. The Florida Supreme Court ruled that a first amendment right to gather the news did not exist, that the statute was constitutional as applied, and that "[a] different rule could have a most pernicious effect upon the dignity of man." 351 So. 2d at 727.

273. *Hart v. State*, 103 So. 633, 635 (Fla. 1925).

The origin of the exclusionary rule in Florida has been variously ascribed to court action and to legislative enactment. Cases tracing the exclusionary rule's origin to court decision include, e.g., *Sing v. Wainwright*, 148 So. 2d 19, 20 (Fla. 1962) (citing *Jackson v. State*, 99 So. 548 (Fla. 1924) (*Jackson* dealt with the right to resist unlawful search; it did not deal with the exclusionary rule)); *Taylor v. State*, 355 So. 2d 180 (Fla. 3d Dist. Ct. App. 1978) (citing *Gildrie v. State*, 113 So. 704 (Fla. 1927) (exclusionary rule; often cited as the leading case)). Other cases have ascribed the exclusionary rule to legislative action in 1927. See *Chacon v. State*, 102 So. 2d 578, 589 (Fla. 1958) (citing FLA. STAT. § 933.19). FLA. STAT. § 933.19 (1977)

been regarded as a mere codification of preexisting Florida law, thereby incorporating pre-1968 interpretations,²⁷⁴ though the 1968 commentary describes it as a "major change."²⁷⁵ In any event, pre-1968 decisions did not settle whether the exclusionary rule prevents introduction of illegally obtained evidence in civil or administrative proceedings.²⁷⁶ The plain language and deterrent purpose of the rule support a total proscription.²⁷⁷

The incorporationist view of the 1968 exclusionary provision has led to one erosion of the rule of otherwise complete inadmissibility: in a nonwiretap case, illegally seized evidence has been admitted for impeachment purposes, notwithstanding the apparently total prohibition of article I, section 12.²⁷⁸ So long as the statutory exclusionary rule remains intact, this judicial exception will have no impact in wiretap cases.²⁷⁹

3. *A State Constitutional Right of Privacy*: Byron Harless, Schaffer, Reid & Associates, Inc. v. State *ex rel* Schellenberg²⁸⁰

As previously mentioned, the Jacksonville Electric Authority retained the Byron Harless psychological consulting firm to conduct a search for a new managing director. Confidential interviews explored highly personal aspects of the candidates' lives. Subsequently, a television station sought access to the psychologists' notes. The First District Court of Appeal held that the notes were public records but that to disclose them would violate rights of privacy guaranteed by the state and federal constitutions.

is an intriguing statute which adopted the United States Supreme Court's decision in *Carroll v. United States*, 267 U.S. 132 (1925), as the admissibility rule in Florida. The statute is still in force.

Hart appears to be the earliest Florida case to adopt the exclusionary rule in Florida and predates the 1927 legislative enactment.

274. *Dornau v. State*, 306 So. 2d 167, 169-70 (Fla. 2d Dist. Ct. App. 1974), *cert. denied*, 422 U.S. 1011 (1975).

275. D'Alemberte, *Commentary*, in 25A FLA. STAT. ANN. 269 (West 1970).

276. Note, *Admissibility of Illegally Obtained Evidence in Noncriminal Proceedings*, 22 U. FLA. L. REV. 38, 53 (1969).

Dictum in one decision states that "evidence secured as result [sic] of an illegal search is inadmissible as evidence in any cause" *Weiner v. Kelly*, 82 So. 2d 155, 157 (Fla. 1955) (emphasis added).

277. Even if the constitutional rule were construed narrowly, the statutory rule prevents introduction in evidence of an illegally obtained communication or evidence derived therefrom "in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof" FLA. STAT. § 934.06 (1977).

278. *Dornau v. State*, 306 So. 2d 167 (Fla. 2d Dist. Ct. App. 1974), *cert. denied*, 422 U.S. 1011 (1975).

279. See note 277 *supra*. See generally *In Re Grand Jury Investigation* (Frank Cobo), 287 So. 2d 43 (Fla. 1973).

280. No. DD-30 (Fla. 1st Dist. Ct. App. June 1, 1978).

Judge Robert Smith, writing for the First District Court of Appeal, acknowledged that the federal right of privacy has generally been confined to the categorical relationships of marriage, procreation, contraception, childrearing and education, and family relationships.²⁸¹ But, he continued,

Intimate relationships are not protected because those relationships are constitutional norms of life, but because they involve "matters so fundamentally affecting a person" that government intrusion tends to debase personhood. Intimate relationships are not themselves the core of the right of privacy, either in its aspect of decisional autonomy or that of disclosural privacy. At the core is the inviolability of personhood. . . .

A fundamental aspect of personhood's integrity is the power to control what we reveal about our intimate selves, to whom, and for what purpose.²⁸²

Finding a degree of support in *Whalen v. Roe*²⁸³ and *Nixon v. Administrator of General Services*,²⁸⁴ the court concluded that disclosural privacy was protected by the Federal Constitution.²⁸⁵

Judge Smith then reviewed various provisions of the Florida Constitution, finding within them a variety of protections for individual privacy:

The Florida Constitution restates the fundamental guaranties of the United States Constitution which are associated with the right of privacy: the "inalienable rights" of persons, including the "right to enjoy and defend life and liberty, to pursue happiness," to worship and speak freely, to security against unreasonable searches and seizures, and to protection by due process against deprivation of life and liberty. But the Declaration of Rights also contains, more explicitly than any clause of the United States Constitution, a guaranty of the right of disclosural privacy. Section 12 of the Declaration of Rights protects the "right of the people to be secure . . . against the unreasonable interception of private communications by any means" ²⁸⁶

Smith cited several Florida decisions as evidence that there has been recognition in the past of a right of privacy, in both decisional

281. *Id.*, slip op. at 13.

282. *Id.* at 14-15 (footnotes omitted).

283. 429 U.S. 589 (1977).

284. 433 U.S. 425 (1977).

285. No. DD-30, slip op. at 15-16, 29.

286. *Id.* at 16-17 (citing FLA. CONST. art. I, §§ 2-4, 9, 12).

and disclosural aspects.²⁸⁷ He concluded that the state constitution "expresses the theme that disclosural privacy—the personal right of some control over the broadcast of intimate information concerning the self—is an aspect of personhood which is to be protected . . . as fundamental."²⁸⁸ He identified the precise source of the state constitutional right of privacy as the liberty protected by the due process clause.²⁸⁹

The First District Court of Appeal ruled that these rights of privacy could be overcome only by an overriding or compelling state interest. The court resolved a preliminary issue, that there must be a legitimate expectation of privacy before the right will attach, and then concluded that there was no compelling public interest in revealing the information in the consultants' papers.

Byron Harless breaks new ground with regard to the state and federal rights of privacy.²⁹⁰ The federal constitutional analysis is creative in its examination of the relationship between decisional and disclosural privacy. It is possible, though by no means certain, that the United States Supreme Court would endorse the result reached.

The state constitutional analysis employed by Smith is much like that used by the United States Supreme Court in 1965 in *Griswold*. Smith began with the accurate premise that the state constitution protects a variety of privacy interests. The court may have placed more of a burden on article I, section 12, and on several court decisions, than they are able to bear,²⁹¹ but the result is undoubtedly correct. Indeed, one may plausibly argue that privacy is implicit in one's inalienable right to liberty, or the liberty protected by the due process clause, without regard to the protection of privacy by other constitutional sections or court decisions.²⁹² One has a right—a pri-

287. *Id.* at 17 (citing, as examples of decisional autonomy, *Pasco v. Heggen*, 314 So. 2d 1 (Fla. 1975); *Battaglia v. Adams*, 164 So. 2d 195 (Fla. 1964); *Jones v. Smith*, 278 So. 2d 339 (Fla. 4th Dist. Ct. App. 1973), *cert. denied*, 415 U.S. 958 (1974); as examples of disclosural privacy, *In re Grand Jury Investigation*, 287 So. 2d 43, 47 (Fla. 1973); *Hagaman v. Andrews*, 232 So. 2d 1, 6-7 (Fla. 1970); and "the remarkably prescient" *Cason v. Baskin*, 20 So. 2d 243, 250 (Fla. 1944)).

288. No. DD-30, slip op. at 19.

289. *Id.* at 29.

290. *Byron Harless* is similar in certain respects to a well-reasoned Alaska case, *Falcon v. Alaska Pub. Offices Comm'n*, 570 P.2d 469 (Alaska 1977). *Falcon* dealt with the Alaska conflict of interest law, as applied to a physician member of a local school board. The law required disclosure of the names of the doctor's individual patients. The Alaska Supreme Court held that the statute, as applied to reveal patients' names, constituted an impermissible infringement on their constitutionally protected zone of privacy.

291. As the court acknowledged, some of the decisions relied on were not expressly decided in constitutional terms or did not rest specifically on the Florida Constitution.

292. Given the holding in *Byron Harless* that a right of privacy is implicit in the current

vacy right—to be protected when government agents extract highly personal information on solemn oaths of confidentiality, then place it in files that are open to the public.

But in resolving one privacy issue, the court overlooked another. The attorney general's suggestion that the psychologists' notes should never have been made and should be destroyed or returned was characterized by the court as a "*cri de coeur*."²⁹³ But it may be that the attorney general sensed the underlying privacy issue: whether psychological employee screening of this type, when conducted for government agencies, is a violation of a fundamental right of privacy.

One of the characteristics of constitutional privacy is protection against governmental intrusion—whether physically, into one's home or office or person, or psychologically, into one's thoughts, ideas, beliefs, or fundamental decisions. As the *Byron Harless* court put it, the core idea is "the inviolability of personhood." Intimate relationships are protected "because they involve 'matters so fundamentally affecting a person' that government intrusion tends to debase personhood."

It is difficult to imagine a greater violation of personhood than the psychological interviewing process used in this case. The psychologists engaged in the most deeply personal inquiries, having not even an arguable relationship to the interviewee's ability to manage a municipal utility. Among them were "church and recreational associations"; "his wife's personality and her relationship to his career"; "self-image ('square, loner—not with crowd')"; "his children (one child is described as 'lost sheep of family, wandering, dropped out of college—not dope')"; "ideas for living his 'life over' and psychological test results."²⁹⁴ As the court explained it, the psychologists' notes portrayed the interviewees "in intimate detail. The portraits [were] based on the prospects' own statements, induced by a promise of confidentiality, which reveal[ed] personal characteristics, relationships, thoughts, beliefs and aspirations."²⁹⁵

Oddly enough, it does not seem to have occurred to the court that such inquiries violate the very privacy it had just recognized.²⁹⁶ Or-

state constitution, one might well ask why the constitution should be amended to make that right explicit. The difficulty is that few state courts have so held. *Byron Harless* is only a district court of appeal decision which has not been reviewed, at this writing, by the Florida Supreme Court. Additionally, placement of an express provision in the constitution provides a clear expression of the citizens' desire to protect the right of privacy. See generally *Toward a Right of Privacy*, *supra* note 1, at 688-90.

293. No. DD-30, slip op. at 3.

294. *Id.* at 9-11.

295. *Id.* at 11.

296. This aspect of the constitutional issue was apparently not argued since the informa-

dinarily, any governmental agency inquiry into "relationships, thoughts, beliefs and aspirations" is enough to raise constitutional danger flags. But intrusion by any other name, it seems, is psychology.

The attorney general asked the court "to enunciate a public policy which prohibits, in the absence of statute, public funds to be expended for psychological and personality employee screening."²⁹⁷ Since the request was placed on public policy rather than constitutional grounds, the court was undoubtedly correct in declining so to rule. But the court went on to say, "we should hesitate in any event to deprive public employers of interview methods which are widely employed in private industry to obtain employees suitable for sensitive tasks. Unless prohibited by law, agencies may acquire for evaluation such personal information as is here recorded."²⁹⁸ This aspect of the decision is unfortunate, for it overlooks an important privacy issue and simultaneously creates a harmful side effect for the public right to know.

The flaw in the analysis is the analogy to activity outside government. The constitutional right of privacy reaches public action but does not directly regulate the private sector. The fourteenth amendment limits state action, not private action. Absent statutory or case-law regulation, private organizations are free to practice managerial cloning if they choose, using psychological consultants to assure uniformity of lifestyle, thought pattern, family composition, and any number of other non-performance-related criteria.

Among public agencies, plainly the rule must be otherwise. There must at least be a rational relationship between the information sought and the responsibilities of the job to be performed. As the inquiry begins to impinge on fundamental rights of privacy, thought, belief, or association, there must—as the court itself decided—be a compelling or overriding public interest. And there is surely no overriding public interest in unearthing intimate facts which have little or no relationship to the duties the job applicant seeks to perform. The attorney general was right in asking for cessation of this type of activity, though wrong in resting the request on public policy rather than on constitutional grounds.

The endorsement of psychological screening methods is likely to be a focus of general criticism of *Byron Harless*, though for different reasons. Public employee recruitment ordinarily is subject to the

tion had already been collected, though the attorney general objected to psychological interviewing techniques on public policy grounds.

297. No. DD-30, slip op. at 28.

298. *Id.*

open records and open meetings laws. After *Byron Harless*, those laws can be circumvented simply by delegating the screening process to a psychological consulting agency, thus cloaking all information gathered in a constitutional mantle of confidentiality.²⁹⁹

Byron Harless has, therefore, both positive and negative features. It takes a dramatic step in declaring the existence of a state as well as a federal constitutional privacy right. The First District has supported its position with a thorough and thoughtful analysis of the privacy issues. The court reached the correct result in protecting the privacy of the interviewees.³⁰⁰

The difficulty is that the decision did not go far enough. The fundamental question is whether information of this type can be constitutionally collected in the first instance. A ruling that such personal information cannot be collected constitutionally would have protected privacy while limiting the need for confidentiality in recruitment. But the court did not take that view.

V. THE 1978 CONSTITUTION REVISION COMMISSION: DELIBERATIONS AND PROPOSALS

A. *The First Phase*

The Constitution Revision Commission held its organizational session on July 6, 1977. One of the commissioners, then Chief Justice Ben F. Overton, called for action to protect individual privacy:

The fact that this is an age where citizens are more aware of their legal rights is partly because our government now touches or controls many more citizens than ever before. Because government in its operation does affect more citizens, the task of this Commission to review our basic constitutional document is even more critical to ensure constitutional protection of individual rights.

Another factor that should be recognized is that changes in our way of life occur very rapidly Our technological advance-

299. Confidentiality might be appropriate in the ordinary recruitment process in limited circumstances. But *Byron Harless* complicates the matter by sanctioning the collection of considerable amounts of material for which confidentiality is essential.

300. The court reported no concession by the television station that the consultants' notes ought to be kept confidential. One suspects, however, that the television station was less interested in the contents of the notes than it was in vindicating the principle involved. The 1976 legislature had adopted an amendment to the public records law expressly designed to make public the records, including work product, of private consultants under contract to public agencies. The amendment was intended to overrule an earlier First District Court of Appeal case holding that such work product was not a public record within the meaning of the public records law. See No. DD-30, slip op. at 5-6. Given that background, it is not surprising that the Jacksonville Electric Authority's recruitment procedure was challenged.

ments continue to surpass our imagination, but our political and economic problems are increased with this advancement.

And who, ten years ago, really understood that personal and financial data on a substantial part of our population could be collected by government or business and held for easy distribution by computer operated information systems? There is a public concern about how personal information concerning an individual citizen is used, whether it be collected by government or by business. The subject of individual privacy and privacy law is in a developing stage. Fifteen states have adopted some form of privacy legislation, and many appellate courts in this nation now have substantial right of privacy issues before them for consideration. It is a new problem that should be addressed.³⁰¹

At the outset, the entire commission held a series of public meetings throughout the state, soliciting citizen suggestions. The author testified at a hearing on the declaration of rights urging the adoption of a right of privacy as a separate section of the revised constitution.³⁰² The presentation summarized the information which was later published in *Toward a Right of Privacy*.³⁰³ The author recom-

301. Address by Chief Justice Ben F. Overton to the Constitution Revision Commission (July 6, 1977).

302. The Center for Governmental Responsibility, Public Testimony Before the Florida Constitution Revision Commission, Summaries of Hearings August 18, 1977—September 26, 1977, at 76-79 (Oct. 6, 1977). See also Fla. C.R.C., Summary of Proposed Revisions to the Florida Constitution 7 (Sept. 27, 1977).

303. See note 1 *supra*. After reviewing the history of the privacy idea, the author provided the commissioners with the texts of the relevant provisions of the 10 states whose constitutions in some way protect privacy. These were classified into three groups. In the first were the states with a strong, freestanding right of privacy—Alaska, California, and Montana. In the second were the states that have included privacy with the prohibition against unreasonable searches and seizures, thus affording an intermediate level of protection—Florida, Hawaii, Illinois, Louisiana, and South Carolina. In the third were Washington and Arizona, for which the right of privacy is the functional equivalent of the prohibition of unreasonable searches and seizures.

In his presentation, the author noted that if the commission decided to include a privacy right in the constitution, several issues would need to be examined. First, the commission would need to decide whether to try to define privacy or, as other states have done, leave the precise boundaries open for case-by-case adjudication. Second, a balance would need to be struck between the right of privacy and the right to know, possibly in the constitution itself. Third, a decision would need to be made on whether the privacy right should be self-executing or not.

Finally, the author suggested that the commission would need to consider what standard of review should be applied when weighing the right of privacy against other important interests. For a strong right of privacy, the author maintained that the standard would need to be the same as that for other important personal rights, like freedom of speech. The author suggested that a right of privacy could be adopted without impairing other important societal goals, including freedom of the press, open government, and financial disclosure.

At a more conceptual level, the author suggested that the function of a declaration of rights

mended that there be a freestanding right of privacy as a separate section of the Florida Constitution. The specific suggestion was a modified version of the Montana constitutional provision, which read: "The right of the people to privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."³⁰⁴

B. *The Committee Proposals*

After the public hearings ended in September, 1977, the commission divided into committees. Commission Chairman Talbot "Sandy" D'Alemberte created an Ethics, Privacy and Elections Committee to examine several interrelated problems, including privacy, free speech, open meetings, public records, and financial disclosure.³⁰⁵

1. *Private Communications*

The logical beginning for the committee's deliberations was the question of whether there should be any change in the Florida Constitution's existing privacy provision. Article I, section 12 was modified in 1968 to protect against the "unreasonable interception of private communications by any means." The committee quickly decided that there was no inconsistency between the specific protection afforded by section 12 and the more general statement which would be provided by a freestanding right of privacy. The committee concluded that "any action concerning a right to privacy should not impact upon this specific provision."³⁰⁶ The committee voted to carry section 12 forward unchanged.³⁰⁷

within a constitution is to describe the relationship of the individual to his or her government and to other members of the society. The optimum relationship was best described by John Stuart Mill's "one very simple principle":

That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others Over himself, over his own body and mind, the individual is sovereign.

J. MILL, *ON LIBERTY* 13 (Bobbs-Merrill ed. 1956). The author concluded that we use the term "right of privacy" as shorthand for that zone of autonomy which every individual should have.

304. See *Toward a Right of Privacy*, *supra* note 1, at 739.

305. Fla. C.R.C., Ethics, Privacy and Elections Committee Minutes 1-2 (Oct. 5, 1977) [hereinafter cited as October 5 Minutes].

Chaired by Commissioner Jon Moyle, members included Vice Chairwoman Lois Harrison, former Governor LeRoy Collins, Dexter Douglass, Jesse McCrary, Chief Justice Ben Overton, J.B. Spence, Senator Kenneth Plante, and Charlotte Hubbard (alternate commissioner). Staff support was provided by Florida State University law professor Patricia Dore.

306. Fla. C.R.C., Ethics, Privacy and Elections Committee Minutes 5 (Oct. 14, 1977) [hereinafter cited as October 14 Minutes].

307. October 5 Minutes, *supra* note 305, at 4-5; October 14 Minutes, *supra* note 306, at

2. *The Right of Privacy*

From the outset, the committee agreed in principle that there should be a right of privacy.³⁰⁸ The committee also was of the view, later confirmed in the voting, that the commission as a whole favored the idea. The discussion focused, therefore, on the precise form the privacy right should take.

The first issue to surface was the standard of review. At the committee's initial meeting on October 5, 1977, the author's proposal was used as the starting point for discussion.³⁰⁹ The author had followed the Montana Constitution by including the compelling state interests standard in the privacy provision itself but was unsure if that was the best approach.

Florida has never adopted the federal two-tier model of rational basis and strict scrutiny, the latter being applied in the federal system where fundamental rights or suspect classifications are involved. Inclusion of the compelling state interest standard in the Florida Constitution could introduce confusion in Florida constitutional law unless it were also applied to other fundamental rights. The federal model has been much criticized, and an express constitutional mandate for a compelling interest analysis could produce rigidity in judicial review at a time when many courts are moving away from the two-tier system.

On the other hand, absent a standard of review, the privacy section appears to state an absolute. The Alaska Constitution, for example, provides that "[t]he right of the people to privacy is recognized and shall not be infringed."³¹⁰ But much of government involves intrusion on privacy in some way. Some intrusions are necessary for vital functions to be carried out. It is, as H.L.A. Hart put it, "a question of *justification*," for "the use of legal coercion by any society calls for justification as something *prima facie* objectionable to be tolerated only for the sake of some countervailing good."³¹¹

The first step taken by the courts considering a new constitutional right should be, and usually is, to decide the standard of review: what sort of showing must be made in order to justify government impingement on a fundamental right. This is a crucial decision. If the reviewing court decides that one must show a compelling or

5-6. The committee did not discuss specific court decisions construing art. I, § 12.

The Ethics, Privacy and Elections Committee shared jurisdiction of § 12 with the Declaration of Rights Committee, chaired by Commissioner Collins. That committee likewise recommended no change.

308. October 5 Minutes, *supra* note 305, at 1-2, 4.

309. *Id.* at 4.

310. ALASKA CONST. art. I, § 22.

311. H. HART, LAW, LIBERTY, AND MORALITY 20 (1969) (emphasis in original).

overriding state interest, or the like, then the proposed privacy right will be a strong one.³¹² On the other hand, if the courts decide that a mere rational basis is all that need be shown, then the privacy right will add little or nothing to the constitution.³¹³

It is impossible to predict what standard of review would be adopted for a new constitutional right. Florida decisions have dealt with standards of review in connection with federal, but not state, constitutional rights. The danger is great that state constitutional cases will be decided on their particular facts or in an unarticulated process of balancing.

Thus, there was much to be said for including an express standard of review in the constitution. The compelling interest standard shifts the burden to the state to justify the validity of a regulation, and an extremely high degree of necessity must be shown. Indeed, the test has been criticized as one which is too difficult for the government to meet, and the author worried that it might be thought to impose too high a standard. The author concluded that the compelling state interest standard should be specified in the constitution, though it was a close question.³¹⁴

The committee disagreed. To the author's surprise, the committee members felt that the compelling interest standard was too weak, not that it was too strong.³¹⁵ They feared that inclusion of the standard in the constitutional provision would invite the courts to create exceptions and invite government agencies to test the permissible limits of the right. The committee members believed there would be little judicial reluctance to find a great many state interests to be "compelling."³¹⁶ A staff paper on the meaning of the phrase did nothing to allay their fears, and the compelling state interest standard was dropped from consideration.³¹⁷

The second major issue confronted by the committee was whether the privacy section should apply only to government intrusion or to

312. See, e.g. *White v. Davis*, 533 P.2d 222, 234 (Cal. 1975). Alaska first adopted the compelling interest standard, then changed to a "middle tier" approach. Compare *Breese v. Smith*, 501 P.2d 159 (Alaska 1972) with *Ravin v. State*, 537 P.2d 494 (Alaska 1975).

313. See, e.g., *State v. Baker*, 535 P.2d 1394 (Hawaii 1975).

314. Commission Chairman D'Alemberte suggested that the commission might consider adopting such a standard with reference to several of the fundamental rights in the declaration of rights. Telephone conversation with Chairman D'Alemberte (Aug. 1977). See also October 14 Minutes, *supra* note 306, at 2-3.

315. October 14 Minutes, *supra* note 306, at 3.

316. The substance of the discussion does not appear in the minutes. See Fla. C.R.C., Ethics, Privacy and Elections Committee Minutes 6 (Oct. 19, 1977) [hereinafter cited as October 19 Minutes]. See also October 14 Minutes, *supra* note 306, at 4.

317. This course of events is strikingly similar to that in the 1972 Montana Constitutional Convention on the same issue. See *Toward a Right of Privacy*, *supra* note 1, at 697-99.

private intrusion as well. There had been an early consensus that the privacy right should be self-executing. The question of its scope was less settled.

It is rare for constitutional measures to reach private action. Under conventional doctrine, a state constitution serves as a restraint on otherwise unrestrained sovereign power. Thus, if privacy is to be protected against government action, constitutional measures are needed. But private action is subject to regulation through statutes and court decisions. Ordinarily, therefore, private action need not be restrained by constitutional provisions. This, however, is not universally observed. California has adopted a self-executing right of privacy which applies directly to both the public and the private sectors.³¹⁸

The author proposed a privacy right applicable to government intrusion only. But the committee initially expressed strong feelings that private action should be proscribed as well.³¹⁹ Committee members reasoned that intrusion was no less offensive when done by the private sector. Consequently, the constitutional right should protect against intrusion, regardless of the source. The committee felt that dealing with the issue comprehensively in the constitution would provide more certainty and direction for the courts than if privacy law evolved by implication from other more generalized rights.³²⁰

The committee view was not long in drawing opposition. Commission Chairman D'Alemberte urged that the right of privacy speak only to governmental intrusion.³²¹ Mr. James Spaniolo, counsel for the *Miami Herald*, foresaw potential problems for the newsgathering activities of the press. He argued that private intrusion could be addressed more effectively by statute and that tort law already provided remedies for invasion of privacy by private persons or businesses. He feared that a constitutional provision would trigger litigation to determine whether new causes of action or new theories of privacy had been created. Assistant Attorney General Sharyn Smith voiced the same concern.³²²

318. CAL. CONST. art. I, § 1; see *Toward a Right of Privacy*, *supra* note 1, at 702 n.364, 705-06.

Illinois has been described as "the only State whose constitution explicitly guarantees an affirmative legal remedy for privacy invasions." *PRIVACY LAW IN THE STATES*, *supra* note 5, at 1. But that provision merely guarantees access to courts. Remedies are fashioned as part of Illinois common law. The Illinois Constitution does not provide a self-executing right of privacy applicable to the private sector.

319. See October 14 Minutes, *supra* note 306, at 4-5; October 19 Minutes, *supra* note 316, at 7.

320. October 19 Minutes, *supra* note 316, at 7.

321. October 14 Minutes, *supra* note 306, at 2.

322. October 19 Minutes, *supra* note 316, at 7-8.

In contrast, the author believed the press was unlikely to be affected at all.³²³ He found it difficult to conceive that such a right of privacy would do more to the areas of concern to the press than constitutionalize the already well-defined boundaries of the invasion of privacy tort. The unsettled areas of private-sector privacy law, he believed, were those relating to the accumulation of vast amounts of information in computer data banks and similar types of intrusion.³²⁴

Despite the opposition, it appeared on October 19 that the committee would approve a measure reaching both private and governmental intrusion.³²⁵ The committee began to waiver, however, as Commissioner Overton wondered aloud whether the committee proposal would overrule *Florida Publishing Co. v. Fletcher*, a recent tort privacy case.³²⁶ Committee Chairman Moyle likewise expressed concern about the private-sector aspects and obtained agreement to defer the matter.³²⁷

By the committee's final meeting on November 21, 1977, the idea of a self-executing right against private intrusion had been abandoned. Instead, the privacy right would have two parts. There would be a self-executing right against governmental intrusion, and there would be a non-self-executing mandate that the legislature protect against intrusion by others.³²⁸ Given that formula, most of the opposition died away.

The third topic of debate in the committee was the specific language to recommend to the commission. The author's proposal was merely one of several suggestions. For example, Commission Chairman D'Alemberte recommended the following: "The right of citizens to individual privacy shall not be infringed by government."³²⁹

It was Assistant Attorney General Sharyn Smith, however, who suggested the approach eventually adopted by the committee. Her formulation was: "The right of the people to be let alone and free from unreasonable governmental intrusion into their private lives is recognized and shall not be infringed."³³⁰ Professor Patricia Dore

323. *Id.* at 8.

324. See Proposed Amendments to [California] Constitution, General Election, November 7, 1972, at 26-28, reproduced in *Toward a Right of Privacy*, *supra* note 1, at 702-04 n.364. One commissioner cited Ralph Nader's surveillance episodes with General Motors. See *Nader v. General Motors Corp.*, 255 N.E.2d 765 (N.Y. 1970).

325. October 19 Minutes, *supra* note 316, at 8.

326. *Id.* (referring to *Florida Publishing Co. v. Fletcher*, 340 So. 2d 914 (Fla. 1976), cert. denied, 431 U.S. 930 (1977)).

327. October 19 Minutes, *supra* note 316, at 8.

328. Fla. C.R.C., Ethics, Privacy and Elections Committee Minutes 4-5 (Nov. 21, 1977) [hereinafter cited as November 21 Minutes].

329. October 14 Minutes, *supra* note 306, at 2.

330. *Id.* at 4. The minutes do not reproduce the text of her recommendation.

formulated eight variations on that theme, embracing the various viewpoints that had been placed before the committee.³³¹ On October 19, Commissioner Douglass, the committee's most vigorous privacy advocate, moved the adoption of the following: "The right of the individual to be left alone and to be free from governmental or private intrusion is essential to the well-being of a free society and shall not be infringed."³³² Though the amending process was completed, there were misgivings about the private intrusion aspect, and the Douglass proposal never came to a vote.

By the November 21 meeting, the privacy section had metamorphosed into the two parts in which it would ultimately be proposed to the full commission as a new section 23 in article I: "Every individual has the right to be let alone and free from governmental intrusion into his private life," and "The legislature shall protect by law the private lives of the people from intrusion by other persons."³³³ Commissioners Collins and Overton sought to insert the word "unwarranted" before the word "intrusion" in both sentences, on the theory that some intrusions are inherent in governmental and private activity, and only unreasonable intrusions ought to be prohibited. The other committee members believed that to qualify the privacy right in that way would reduce it to a nullity. The committee defeated both proposed amendments. Thus, the measure was passed without the word "unwarranted" and introduced by the committee as Proposal No. 132.

3. *Financial Disclosure*

In November, 1976, less than a year before the Constitution Revision Commission began work, Florida voters ratified article II, section 8 of the constitution. Popularly known as the Sunshine Amendment, it created a scheme of detailed financial disclosure. The Sunshine Amendment had been placed on the ballot through an initiative campaign organized by Governor Reubin Askew after he had been unable to secure legislative approval of similar measures.³³⁴

Given the recent and overwhelming general election vote, there was little support for any modification of the Sunshine Amendment.

331. Memorandum to Ethics, Privacy and Elections Committee from Patricia Dore (Oct. 19, 1977); see October 19 Minutes, *supra* note 316, at 6.

332. October 19 Minutes, *supra* note 316, at 8.

333. November 21 Minutes, *supra* note 328, at 4-5. Professor Dore had produced a number of alternatives for the committee's consideration, including the version adopted by the committee.

334. See Note, *Legislative Efforts to Amend the Florida Constitution: The Implications of Smathers v. Smith*, 5 FLA. ST. U.L. REV. 747, 755 n.40, 781 (1977).

Moreover, with the addition of the right of privacy, it was necessary that financial disclosure retain constitutional status lest it be argued that the right of privacy had effected an implied repeal. All proposed modifications to the Sunshine Amendment were defeated, and it was carried forward intact.³³⁵

4. *Open Government*

As with financial disclosure, there was concern among the commissioners that adoption of the right of privacy alone, without a corresponding "right to know," might impliedly repeal or weaken provisions for open meetings, public records, and judicial proceedings. The eventual solution was to address the issue in the constitution itself by elevating the current open meetings and public records laws to constitutional status.

A somewhat different course was taken than in Montana. There the voters adopted a single "right to know" section, declaring the right to examine public documents and deliberations, "except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."³³⁶ Montana tipped the balance in favor of disclosure by saying that the demands of individual privacy must clearly exceed the merits of disclosure.³³⁷

But the Montana provision left troublesome, unanswered questions. First, who would make the determination? Could government bodies unilaterally begin closing records and proceedings, using privacy as an excuse, thereby causing litigation and delay in public access? Second, could the government invoke secrecy to protect a governmental, rather than a privacy, interest? Could the government keep secret the answers to civil service examinations or competitive bids until the time for bid opening? Finally, would a single rule suffice for all branches of government, or were special rules

335. See October 14 Minutes, *supra* note 306, at 7; November 21 Minutes, *supra* note 328, at 1-2.

The situation was complicated by the fact that several powerful senators had filed a federal court privacy challenge to the Sunshine Amendment, refusing in the meantime to comply with its disclosure provisions. See *Plante v. Gonzalez*, 437 F. Supp. 536 (N.D. Fla. 1977), *aff'd*, no. 77-3109 (5th Cir. June 30, 1978); section IVC(3) *supra*. Three of the senators—Kenneth Plante, Dempsey Barron, and John Ware—served on the Constitution Revision Commission, and Senator Plante was a member of the Ethics, Privacy and Elections Committee. The district court heard and decided *Plante v. Gonzalez* in September, 1977, and an appeal was pending in the Fifth Circuit throughout the balance of the deliberations of the commission. Senator Plante had prepared a series of proposed modifications to the Sunshine Amendment, but he withdrew them when it became evident that the members opposed any change at all. See November 21 Minutes, *supra* note 328, at 1-2. It may be worth noting that 15 of the 37 commissioners were appointed by Governor Askew, the principal author of the Sunshine Amendment.

336. MONT. CONST. art. II, § 9.

337. See *Toward a Right of Privacy*, *supra* note 1, at 699-700.

needed for the judiciary?

In answer to the first question, the committee decided that exceptions to disclosure should be made by general law, not by any agency or governmental body. In the case of the judiciary, the committee felt exceptions could also be made by rule. In answer to the second question, it seemed clear that on occasion the government has a legitimate interest in confidentiality which has nothing to do with individual privacy. The secrecy of civil service examination answers and sealed competitive bids serves important governmental interests, but only by the most tortured logic could nondisclosure of those matters be said to protect individual privacy. Thus, the committee concluded that confidentiality should be allowed also to protect overriding governmental purposes. Finally, in view of the supreme court's substantial rulemaking power, the committee concluded that judicial proceedings and records could be made confidential by general law or by rule. However, the same limitations would apply: confidentiality could be justified only for the protection of privacy interests or overriding governmental purposes.³³⁸

Of necessity, the language used to give effect to these policies was somewhat intricate. With regard to nonjudicial meetings and records, the committee proposed:

No person shall be denied access to any meeting at which official acts are to be taken by any nonjudicial collegial public body in the state or by persons acting together on behalf of such a public body. The legislature may exempt meetings by general law where it is essential to protect privacy interests or overriding governmental purposes.

. . . .

No person shall be denied the right to examine any public record made or received in connection with the public business by any nonjudicial public officer or employee in the state or by persons acting on their behalf. The legislature may exempt records by general law where it is essential to protect privacy interests or overriding governmental purposes.³³⁹

These paragraphs were introduced as Proposals No. 137 and No. 138, respectively.

The suggested measure relating to judicial proceedings and records provided:

338. November 21 Minutes, *supra* note 328, at 6.

339. *Id.* at 5.

All judicial proceedings and records and all proceedings and records of judicial agencies shall be open and accessible to the people. Where it is essential to protect privacy interests or overriding governmental purposes, the supreme court by rule or the legislature by general law may exempt proceedings and records from this section.³⁴⁰

This was introduced as Proposal No. 133. The term "proceedings" was deemed to exclude conferences of appellate judges or deliberations of petit juries. Disciplinary proceedings of The Florida Bar were considered "proceedings" and would be open unless action was taken to exempt them. The Judicial Qualifications Commission would continue to be governed by the express confidentiality provision of article V, section 12(d).³⁴¹

C. *The Commission Considers—And Reconsiders*

The committee recommendations proceeded to the floor of the Constitution Revision Commission for consideration. As the committee had suggested, article I, section 12, relating to unreasonable searches and seizures and unreasonable interceptions of private communications, was carried forward intact. Likewise, article II, section 8, the Sunshine Amendment, was not changed. Changes were made, however, in the committee's privacy recommendation.

1. *The right of privacy*

In January, 1978, the commission took up Proposal No. 132, the proposed right of privacy. The floor managers for the committee proposal were Commissioners Moyle and Douglass. Commissioner Moyle reviewed the development of American privacy law and the growing importance of the states in the protection of privacy. Technological advances and increasing societal interdependence pose threats to privacy, Commissioner Moyle explained, but there is no general constitutional right of privacy as a matter of federal or Florida law. The best solution, he argued, was a self-executing right of privacy against governmental intrusion and a non-self-executing policy statement which would direct the legislature to protect individual privacy against intrusion by the private sector.³⁴²

In response to questions, Commissioners Douglass and Moyle explained that the phrase "to be let alone" had been chosen for its historical and legal significance.³⁴³ They indicated that the phrase

340. *Id.* at 6.

341. *Id.*

342. January 9, 1978 Transcript, *supra* note 3, at 1-14.

343. *Id.* at 22-23. The phrase had been coined by Thomas Cooley in his *Treatise on the*

"governmental intrusion" was used instead of "unwarranted governmental intrusion" in order to make the privacy right as strong as possible.³⁴⁴ Moreover, Moyle maintained that "intrusion carries with it the term of unwarranted. . . . Intrusion has to be unwarranted when you define it."³⁴⁵

Douglass and Moyle asserted that the right of privacy would not impair the ability to conduct criminal surveillance. Article I, section 12 would continue to set the standards for searches, seizures, and interceptions of private communications.³⁴⁶ Background investigations of employees conducted by private employers would not be reached by the self-executing right of privacy; this would instead be left for action by the legislature.³⁴⁷ The right of privacy would apply, however, to investigations of the backgrounds of government employees. Such investigations would have to have reasonable relevance to the position sought and the ability to perform the duties.³⁴⁸

The two commissioners also insisted that the right of privacy would not affect the existing constitutional measure for financial disclosure, the Sunshine Amendment,³⁴⁹ nor, assuming adoption of the committee's other proposals, would it affect open meetings and

Law of Torts in 1880. It had appeared in Warren and Brandeis' 1890 law review article and in a number of court decisions since. Thus it had been selected for the committee proposal in lieu of a more contemporary or grammatically correct phrase.

Commissioners Douglass and Moyle were also asked whether they had considered omitting the phrase "to be let alone" so as to create better parallelism between the two parts of the privacy proposal. The commissioners replied that the proposed language was the best the committee had been able to devise to express the desired result and that numerous combinations had been tried. January 9, 1978 Transcript, *supra* note 3, at 24-25.

A related aspect of that same question is, what is the precise significance of the parallelism within the phrase, "the right to be let alone *and* free from governmental intrusion into his private life"? The phrase suggests that there is some difference between "to be let alone" and "free from governmental intrusion." Without the second part, one logical interpretation would be that "to be let alone" refers to all action, government or private, while "free from governmental intrusion" refers more specifically to government action. But the existence of the second part negates the inference that the first part reaches private action.

The relationship of the two phrases was not specifically discussed in the committee minutes or commission debate. It appears that the two phrases were considered to be synonymous. A declaration of a right "to be let alone" in the context of a constitution which, absent contrary indications, reaches only state action, would necessarily signify a right to be "free from governmental intrusion."

344. January 9, 1978 Transcript, *supra* note 3, at 23-24.

345. *Id.* at 49. Commissioner Douglass' remarks, *id.* at 23, can be read to express the same view. He alluded to Professor Dore's analysis. She had said that "the dictionary definition of the word 'intrusion' indicated 'uninvited' or 'unwarranted' interjection or presence and that in one sense 'unwarranted intrusion' could be considered a redundancy." October 19 Minutes, *supra* note 316, at 7.

346. January 9, 1978 Transcript, *supra* note 3, at 14-16; *see id.* at 33-34, 42-43.

347. *Id.* at 19-20.

348. *Id.* at 30-32.

349. *Id.* at 26-27, 52.

public records laws.³⁵⁰ They said the privacy right would not affect public nuisance or disturbing-the-peace laws, since what is done in public is not private.³⁵¹ In addition, it would not affect existing tort law,³⁵² nor would it inhibit the ability of the government to conduct a census or needed surveys.³⁵³ The right of privacy could, however, afford some additional protection for the doctor-patient relationship, where government agencies sought medical information without adequate confidentiality safeguards, or sought unnecessarily to restrict the prescription of some medicines.³⁵⁴ The right of privacy would not impede discovery in civil litigation since the civil discovery rules were promulgated under separate constitutional authority in article V.³⁵⁵

Commissioner Douglass conceded that the outlook was uncertain for the regulation of behavior within private homes.³⁵⁶ He pointed out that state court decisions have divided on whether the possession of marijuana, for example, is protected by a right of privacy. Thus, the Arizona Supreme Court held that the state could prohibit possession of marijuana within the home, while the Alaska Supreme Court held that it could not.³⁵⁷ Commissioner Douglass felt that the Alaska court had placed greater weight on privacy because of the remoteness of the state. He believed Arizona to be more like Florida. He offered the personal belief that the Florida Supreme Court would conclude that the privacy right would not prohibit regulation of such activities, but conceded that there was no certainty: "There is no assurance of what our court would hold. I have to say that."³⁵⁸

The committee view, accurately represented by Commissioners Moyle and Douglass, did not go unchallenged. Commissioners Overton and Collins sought, as they had in committee, to insert the word "unwarranted" before the word "intrusion."³⁵⁹ A similar motion was made by Commissioner Shevin, who preferred to use the word "unreasonable."³⁶⁰ All three believed that the right of privacy would sweep too broadly if not qualified in some way.

350. *Id.* at 27.

351. *Id.* at 29-30.

352. *See id.* at 31.

353. *Id.* at 32-33.

354. *Id.* at 28.

355. *Id.* at 68-69, 72-74; *see* FLA. CONST. art. V, § 2(a).

356. January 9, 1978 Transcript, *supra* note 3, at 16-18, 75-76.

357. *Id.* at 16-18; *see Toward a Right of Privacy*, *supra* note 1, at 694-95, 729. *Compare* *State v. Murphy*, 570 P.2d 1070 (Ariz. 1977) with *Ravin v. State*, 537 P.2d 494 (Alaska 1975).

358. January 9, 1978 Transcript, *supra* note 3, at 18.

359. *Id.* at 34, 39.

360. *Id.* at 42, 50.

Commissioner Overton argued that the first part of the committee's privacy proposal would lead to the Alaska result allowing possession of marijuana in private homes. The second part might, he believed, overrule *Florida Publishing Co. v. Fletcher*.³⁶¹ Finally, he expressed a concern about possible restrictions on electronic surveillance.³⁶²

In Commissioner Collins' view, the proposed right of privacy, if unmodified, would constitute "an absolute bar for the invasion of privacy," thus making it impossible to conduct essential government activities.³⁶³ He expressed concern about limitations on discovery in civil litigation.

Commissioner Shevin feared that the privacy section might nullify the use of electronic surveillance in organized crime investigations.³⁶⁴ He suggested that the privacy proposal could "lock us into a situation where no governmental action could ever survive the provision of privacy."³⁶⁵

Basically then, the debate was over the scope and likely judicial interpretation of the committee proposal. The proponents of the committee proposal adhered to the views they had expressed previously. Commissioner Douglass argued vigorously that the insertion of "unwarranted" would create a "weasel word" to allow the dilution of an important right.³⁶⁶ Commissioner Moyle pointed out that other fundamental constitutional rights are not protected against "unwarranted" or "unreasonable" intrusion. Rather, they are stated in a straightforward, unqualified way.³⁶⁷ The proponents reiterated their view that the dire consequences would not materialize. Their view prevailed, and the proposed amendments were rejected, twenty-four to eleven.³⁶⁸

The commission then considered and ultimately accepted an amendment adding to the first part of the committee proposal the phrase "except as otherwise provided in this constitution." The amendment was offered by Commissioner Mathews out of fear that the right of privacy would impliedly repeal the Sunshine Amend-

361. 340 So. 2d 914 (Fla. 1976), cert. denied, 431 U.S. 930 (1977); see sections IVA(6) and VB(2) *supra*.

362. January 9, 1978 Transcript, *supra* note 3, at 35-36.

363. *Id.* at 39.

364. *Id.* at 42, 44-45.

365. *Id.* at 44.

366. *Id.* at 37.

367. *Id.* at 48.

368. *Id.* at 50. The vote was on Commissioner Overton's motion to add the word "unwarranted." When it failed, Commissioner Shevin withdrew his motion to add "unreasonable." *Id.*

ment, on the theory that when two constitutional provisions conflict, the later in time controls.³⁶⁹ Although this argument might have some merit with reference to a constitutional amendment, it would appear inapplicable to a complete constitutional revision. But the floor managers acquiesced in the amendment, and it was adopted.³⁷⁰

After still further debate, Proposal No. 132 was approved by a twenty-nine to four vote.³⁷¹ Commissioners Overton and Shevin voted in favor and Commissioner Collins voted against the proposal. The proposed right of privacy was inserted, as amended, into the commission's draft constitution. The draft was completed in January, 1978, and circulated for public comment. Another round of public hearings was held, after which any portion of the constitution could be reconsidered by the commission.

There ensued yet another process of modification. The initial changes were proposed by the Committee on Style and Drafting. The Ethics, Privacy and Elections Committee had consciously chosen the word "individual" in the phrase, "[e]very individual has the right to be let alone," in order to exclude corporations. The committee considered privacy to be a right pertaining only to natural persons and not to corporations. The Committee on Style and Drafting changed "individual" to "natural person" to remove all possible doubt that corporations were to be excluded.³⁷²

After the public hearings, further amendments were offered. On March 7, 1978, Commissioners Collins, Overton, and Shevin again endeavored to add the word "unwarranted" to the privacy section. Commissioner Collins cited public hearing testimony from a representative of the League of Cities suggesting that the privacy amendment could undermine the police and taxing powers of the state. Collins argued that the privacy section could limit law enforcement and suggested that agricultural and health inspections could not be carried out if the privacy right were approved.³⁷³

369. *Id.* at 51-52.

370. *Id.* at 51-61.

371. *Id.* at 76.

372. Fla. C.R.C., Style and Drafting Committee Minutes 5 (Feb. 14-16, 1978); Transcript of Fla. C.R.C. proceedings 12, 15 (Mar. 6, 1978). The same approach was used in art. I, § 9.

The fear that "individual" could be construed to include corporations was not an idle one. That result was reached in Montana, despite an intent to restrict the right of privacy to natural persons. See *Toward a Right of Privacy*, *supra* note 1, at 697-98 & n.334.

The Style and Drafting Committee also changed "in this constitution" to "herein." See Transcript of Fla. C.R.C. proceedings 15 (Mar. 6, 1978).

373. Transcript of Fla. C.R.C. proceedings 9-16, 34, 40-41 (Mar. 7, 1978).

Commissioners Overton and Shevin supported the amendment, arguing that its adoption would better express the intent of the commission and would avoid needless litigation. Their views differed from those of Commissioner Collins, however. They believed that the proposed amendment would clarify the privacy section, rather than work a major substantive change. Commissioner Collins could not support the privacy section without the amendment, but Commissioner Shevin believed the right of privacy should be adopted in any event.³⁷⁴

Commissioner Moyle again opposed adding "unwarranted." He suggested that the judicial approach to a right of privacy would be the same as that for free speech. Though the right of free speech is stated in absolute terms, reasonable restrictions have been allowed. The absolutist view of the first amendment has never prevailed. If the right of privacy is important enough to be placed in the constitution, Moyle argued, "it ought not to be a conditional right. It makes just as much sense to say 'reasonable free speech' as it does 'unwarranted intrusion.'" Intrusion was, he felt, by definition unwarranted. To say "unwarranted intrusion" was redundant.³⁷⁵

After a complicated parliamentary process, the motion to add the word "unwarranted" initially passed,³⁷⁶ but died on reconsideration.³⁷⁷ An amendment to delete the entire privacy section also failed.³⁷⁸ The commission agreed, however, to delete the second part of the committee proposal—that portion which would have mandated the legislature to provide by law for protection against private intrusion.³⁷⁹ The amendment was offered by Commissioner James primarily on the theory that the language was unnecessary.³⁸⁰ Since the constitution serves as a limitation on power, not a grant of power, it was unnecessary to require that the legislature protect rights of privacy from private intrusion. The legislature already possessed the power to do so.

Thus amended, the measure was finally ready for the ballot.

2. *Open government*

Proposals No. 137 and No. 138, relating to open meetings and public records, respectively, were initially debated and voted on in December, 1977. Since they did not receive the required constitu-

374. *Id.* at 25-27 (remarks of Ben Overton); *id.* at 37 (remarks of Robert Shevin).

375. *Id.* at 19, 23-25, 38-39.

376. *Id.* at 41.

377. *Id.* at 180-82.

378. *Id.* at 16-30.

379. *Id.* at 30-33, 183-92; 1 Transcript of Fla. C.R.C. proceedings 75-80 (Mar. 8, 1978).

380. Objection was made also that the second part lacked clarity. March 7, 1978 Transcript, *supra* note 3, at 21-23.

tional majority at that time, they were reconsidered. They passed in January, 1978.

The December debate made it abundantly clear that both proposals were intended to give constitutional status to the open meetings and public records statutes—including the judicial interpretations of each. Commissioner Shevin offered an amendment to the open meetings proposal, objecting that Proposal No. 137 applied only to meetings “at which official acts are to be taken.”³⁸¹ Under one interpretation, elected officials could have “unofficial meetings,” or meetings of less than a quorum, without being subject to the open meetings requirement. Commissioners Moyle and Douglass responded that the language of Proposal No. 137 was the language of the present statute and that the intent was to carry with it the existing judicial construction—which forbade the sort of subterfuge Shevin feared.³⁸² With that assurance, Shevin withdrew his amendment.³⁸³

Commissioner Shevin also offered an amendment to allow the legislature to exempt meetings only to “promote compelling and governmental interests,” rather than “to protect privacy or overriding governmental purposes.” He feared that protection of privacy was too broad and uncertain a criterion, one that might provide the legislature too much discretion to close its meetings. Shevin’s fears were met by the objection that protection of privacy would not be included in the category of “compelling and governmental interests.” The amendment was defeated.³⁸⁴

The commission defeated an amendment which would have included the judiciary in Proposal No. 137. The judicial branch of government was left for separate treatment under Proposal No. 133.³⁸⁵ Also defeated was an amendment proposed by Commissioner Mathews to guarantee public access to meetings only “during good behavior,” in order expressly to allow expulsion of unruly spectators.³⁸⁶ Opponents of the amendment believed reasonable limitations were implicit in the committee proposal and feared “during good behavior” could be given a more expansive reading than intended.

381. December 8, 1977 Transcript, *supra* note 131, at 218.

382. *Id.* at 218-23; *see id.* at 205-06. The judicial construction of the open meetings law is reviewed in section IVC(2) *supra*.

For a caveat indicating that the information placed before the voting public may be more important in aid of judicial construction than the intent of the framers, see December 8, 1977 Transcript, *supra* note 131, at 224-26.

383. December 8, 1977 Transcript, *supra* note 131, at 223.

384. *Id.* at 226-29.

385. *Id.* at 229-37.

386. *Id.* at 209-16.

Proposal No. 137 was thus put to a vote without amendment. It failed to obtain the necessary majority in December but passed easily on reconsideration in January, with little additional debate.³⁸⁷

The discussion of Proposal No. 138, relating to public records, developed along similar lines, with debate in both December and January. The floor managers again made it clear that the intention was to elevate the public records statute to constitutional status.³⁸⁸ As with the open meetings provision, the proposal would limit exemptions to those necessary to protect privacy interests or overriding governmental purposes.

Existing statutory exemptions would not be "grandfathered" into the constitutional provision. Rather, the legislature would be required to review the existing exemptions to assure that they met the constitutional test.³⁸⁹ In order to facilitate the process, the commission approved a delayed effective date of June 1, 1979.³⁹⁰

As in the open meetings debate, an unsuccessful effort was made to include the judiciary.³⁹¹ Some commissioners opposed the measure because it applied to the legislature, a criticism intended also for Proposal No. 137. The legislature has consistently taken the view that the open meetings and public records laws apply only to the executive branch, though Attorney General Shevin has published opinions to the contrary.³⁹² Although legislative rules have opened many records and meetings to the public, exemptions have been created for legislative correspondence and work papers. Commissioner Lew Brantley, president of the senate, candidly argued that, with the passage of Proposal No. 138, pressure from the public and the press would prevent enactment of exemptions for legislative work product and correspondence, exemptions he believed vital.³⁹³

Like the open meetings measure, the public records proposal did not pass in December, but it received the requisite vote on reconsideration in January. As amended, the proposal was added to the ballot.³⁹⁴

387. *Id.* at 239; January 9, 1978 Transcript, *supra* note 3, at 79-81.

388. December 8, 1977 Transcript, *supra* note 131, at 240.

389. January 9, 1978 Transcript, *supra* note 3, at 96-97. There were estimated to be in excess of 100 exemptions. One witness before the Ethics, Privacy and Elections Committee put the figure at 160. October 14 Minutes, *supra* note 306, at 4.

390. January 9, 1978 Transcript, *supra* note 3, at 99-103.

391. *Id.* at 94-96.

392. 1977 FLA. OP. ATT'Y GEN. 077-10; 1975 FLA. OP. ATT'Y GEN. 075-282; 1972 FLA. OP. ATT'Y GEN. 072-16.

393. January 9, 1978 Transcript, *supra* note 3, at 86-90, 97-98; December 8, 1977 Transcript, *supra* note 131, at 243-44.

394. January 9, 1978 Transcript, *supra* note 3, at 104; December 8, 1977 Transcript, *supra* note 131, at 246.

3. *Open judicial proceedings*

The open government proposals discussed earlier pertained only to the executive and legislative branches of government. The judicial branch was singled out for treatment as a special case, though the same basic principles were applied.

The Ethics, Privacy and Elections Committee initially reported Proposal 133 as part of its privacy and open government package. Like Proposals 137 and 138, Proposal 133 contained a general statement of public access to judicial proceedings and records and to proceedings and records of judicial agencies. Exemptions could be granted in order to protect privacy interests or overriding governmental purposes. Although Proposals 137 and 138 allowed only legislative exemptions, Proposal 133 allowed exemptions by supreme court rule for judicial proceedings and records.

In the initial debate in December, 1977, Commissioner Moyle explained the committee's views on Proposal 133. The committee had wanted a specific provision governing the judiciary, lest the other open government provisions, relating to nonjudicial bodies, be thought to "impose some type of confidentiality or secrecy insofar as the judiciary is concerned."³⁹⁵ Thus, as a general principle, proceedings would be open and accessible. Moyle suggested that rule-making might be appropriate to allow closure of certain hearings to the public, such as divorce cases. He also suggested that the supreme court could adopt rules leaving some discretion to trial judges regarding closure in individual cases in which sufficient need was shown.³⁹⁶

Commissioner Moyle explained the committee's view that the term "judicial proceedings" in Proposal 133 did not include conferences of appellate judges or deliberations of petit juries.³⁹⁷ Proceedings of the Judicial Qualifications Commission and Bar disciplinary proceedings would be open unless action were taken by the legislature or by rule to close them.³⁹⁸ However, when Commissioner Moyle indicated the same would be true of grand jury proceedings, the discussion came to an abrupt halt.³⁹⁹ The measure was referred back to committee.⁴⁰⁰

After further work by a subcommittee headed by Commissioner Overton, Proposal 133 re-emerged. As revised, it provided public

395. December 8, 1977 Transcript, *supra* note 131, at 120.

396. *Id.* at 121.

397. *Id.*; see section VB(4) *supra*. The uncorrected transcript consistently refers to "appellate juries" rather than "petit juries."

398. December 8, 1977 Transcript, *supra* note 131, at 121.

399. *Id.*

400. *Id.* at 125.

access to "all judicial hearings," rather than "all judicial proceedings," and contained an express exemption for grand and petit juries.⁴⁰¹ This version was adopted.⁴⁰² Though an intention was expressed also to include the Judicial Qualifications Commission and the judicial nominating commissions in Proposal 133,⁴⁰³ ultimately this idea was dropped. Article V, section 12(d), which provides for confidentiality of Judicial Qualifications Commission proceedings until charges are filed and public disclosure thereafter, was carried forward intact. Article V, section 11, relating to judicial nominating commissions, was modified to declare a policy of public access except insofar as the supreme court by rule exempts portions of records or proceedings in order to protect privacy interests or overriding governmental purposes.

VI. TO BE LET ALONE: PROTECTING THE INDIVIDUAL RIGHT OF PRIVACY

A. *In General*

Certain basic features about the right of privacy emerge from the Constitution Revision Commission proceedings. The right is, to begin with, a *general* right of privacy. The proposed constitution declares, in article I: "*SECTION 23. Right of Privacy.—Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein.*"⁴⁰⁴

This provision is a separate, freestanding constitutional section which declares a fundamental right. The proceedings reveal it was adopted in direct response to the United States Supreme Court's challenge a decade ago in *Katz v. United States*: "the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States."⁴⁰⁵

The revision commission intended to create a strong privacy right, and it chose appropriate means to achieve that intent. As a separate constitutional section, privacy has equal dignity with other fundamental rights. It does not engulf or erode other constitutional rights, but neither is it inferior to them.

401. Transcript of Fla. C.R.C. proceedings 143, 161 (Jan. 13, 1978) [hereinafter cited as January 13, 1978 Transcript].

402. *Id.* at 166; Transcript of Fla. C.R.C. proceedings 4-5 (Jan. 24, 1978).

403. See January 13, 1978 Transcript, *supra* note 401, at 165-66 (Judicial Qualifications Commission); *id.* at 160-62 (judicial nominating commissions).

404. Fla. C.R.C., Rev. Fla. Const. art. I, § 23 (May 11, 1978).

405. 389 U.S. 347, 350-51 (1967) (footnotes omitted).

Like every other state that has taken this step, Florida has created the right of privacy in general terms, leaving precise definitions to be developed through the familiar process of case-by-case adjudication. While this is consistent with Florida practice throughout the declaration of rights, flexibility of definition is particularly important in the case of privacy. As Warren and Brandeis said almost ninety years ago, "Recent inventions and business methods call attention to the next step which must be taken for the protection of the person [N]umerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'"⁴⁰⁶ Just as flexibility of definition has permitted the fourth amendment to be interpreted so as to deal with the technological changes that produced electronic surveillance, so also a right of privacy requires flexibility of definition if it is to remain viable in decades to come.⁴⁰⁷

In evaluating the proposed section 23, it is initially most useful to review the measure phrase by phrase.

"Right of Privacy."—The section begins with the caption, "Right of Privacy." This is the only place that the word "privacy" is found in the proposal. The word does not appear in the text of section 23, though plainly the drafters considered that "the right to be let alone" is synonymous.⁴⁰⁸ Indeed, as the quotation from *Katz* illustrates, the "right of privacy" and the "right to be let alone" have been used interchangeably from the time of Warren and Brandeis' article to the present. Section 23 thus invokes America's most historic phrases in privacy law: Cooley's 1880 "right . . . to be let alone"⁴⁰⁹ and Warren and Brandeis' 1890 "right to privacy."⁴¹⁰

"Every natural person"—Section 23 declares that "every natural person" enjoys the right to be let alone. The words were chosen to make unmistakably clear that section 23 protects human individuals, not corporations or other entities. The right of privacy is de-

406. Warren & Brandeis, *supra* note 15, at 195 (footnote omitted).

407. See generally Packard, *The Work on Man-Animals and Man-Computers*, SATURDAY REV., Aug. 20, 1977, at 46 (excerpt from V. PACKARD, *THE PEOPLE SHAPERS* (1977)).

408. The point is of some constitutional significance. The rules of construction in present art. X, § 12 provide in part that "[t]itles and subtitles shall not be used in construction." FLA. CONST. art. X, § 12(h) (carried forward as art. X, § 11 (g) of the proposed constitution). Thus if the text of § 23 were deemed to create something other than a right of privacy, the fact that the caption reads "right of privacy" would not save it. But the interchangeability of the terms "right of privacy" and "right to be let alone" is so well-established in privacy decisions and writings as not to admit of question on the subject.

409. T. COOLEY, *supra* note 12, at 29.

410. Warren & Brandeis, *supra* note 15, at 196. Warren and Brandeis referred to the "right to privacy" rather than the synonymous "right of privacy." The Supreme Court in *Griswold* adopted the latter phrase, and contemporary usage seems to have followed suit.

signed to protect a fundamental aspect of human liberty. It is not designed as a barrier to the regulation of economic activity.⁴¹¹ Section 23 is the only one of the several privacy provisions restricted to natural persons.⁴¹²

"has the right to be let alone"—Standing alone, the phrase suggests a complete immunity from interference, public or private. But section 23 imposes a series of three further limitations.

"and free from governmental intrusion"—This phrase limits the "right to be let alone" by indicating that section 23 operates only against governmental intrusion.⁴¹³ As against the government, natural persons have a self-executing right of privacy. But section 23 does not apply to intrusions on privacy by private individuals or businesses. The private sector will continue to be regulated by the tort right of privacy and by statute, as in the past.

"into his private life"—The right of privacy does not confer a complete immunity from governmental regulation. Rather, the protected zone consists of the private lives of natural persons. There must be some reasonable expectation of privacy before the right will attach, and by definition that which is knowingly exposed to the public is not private. Although it may be reasonable to protect cer-

411. As Professor Kurland has so ably put it,

In the nineteenth century and well into the twentieth, the concept of individuals and individual freedom was perverted into a form of constitutional protection against the regulation of corporate and organizational economic activities. It should be clear that privacy is an individual's right and not that of a corporation, or a class, or an association. When the affairs regulated are not those of individuals but those of groups, the concern is not privacy. This is not, of course, to suggest that corporations, classes, organizations, and associations are not entitled to constitutional protections, including certainly those of due process of law and freedom of speech and press and political activities. It is simply to say that the right of privacy is essentially the right of a person, an individual, a human being.

Kurland, *The Private I*, U. CHI. MAGAZINE, Autumn 1976, at 34.

412. This, too, was intentional. Thus art. I, § 12 protects the "private communications" of corporations as well as individuals. Proposed art. I, §§ 24-25 and proposed art. V, §§ 1 & 11 allow confidentiality to protect "privacy interests," and those sections are not restricted to the protection of natural persons. Thus the legislature (or the supreme court in art. V) could, if it chose, enact measures to protect the privacy of corporations. Examples could include protection of corporate tax returns, business secrets, and the like from public disclosure by state agencies. See, e.g., section IVC(1) *supra*.

413. Some difficulty arises from the use of the word "and" to introduce the phrase. Under one reading, "and" means "in addition." Thus one has a "right to be let alone," and in addition, a "right to be free from governmental intrusion." But such a reading renders the section nonsensical. Section 23 declares *"the right to be let alone and free from governmental intrusion,"* indicating it is only one right, not a series of rights, that is being described. Moreover, if the first phrase stands by itself, there is an all-inclusive "right to be let alone," after which the right to be "free from governmental intrusion" is superfluous. Thus the only construction which gives meaning to the section is to read it as the drafters intended—as a limitation on the "right to be let alone." See generally *Miami Shores Village v. Cowart*, 108 So. 2d 468 (Fla. 1958).

tain places presumptively, like the home, ultimately an expectation test must control. For example, plainly one yields privacy when one invites strangers into the home to do business with them.⁴¹⁴ But just as plainly, there is a reasonable expectation of privacy for some activities in public places. One does not yield privacy when placing a telephone call from a public telephone booth, for, upon closing the door, one has a reasonable expectation of privacy against intrusion by the uninvited ear.⁴¹⁵

"except as otherwise provided herein."—This final limitation was inserted to make clear that the right of privacy does not undercut the constitutional provisions relating to financial disclosure, public records, and open meetings.⁴¹⁶ The phrase is unnecessary,⁴¹⁷ for it is merely declaratory of the doctrine that repeals by implication are not favored and that constitutional provisions must be read to give harmonious effect to each provision and to the constitution as a whole.⁴¹⁸ The phrase was added for this limited purpose only. It was not intended to create a general substantive test for balancing governmental actions against individual claims of privacy.⁴¹⁹

When one applies section 23 to specific factual situations, the language of the privacy section itself suggests three basic inquiries. First, there is a threshold question of whether the matter is within

414. See, e.g., *State v. Roy*, 510 P.2d 1066 (Hawaii 1973) (defendant invited a drug informer into his home to make a sale). Even so, one does not yield all rights of privacy. See, e.g., *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971) (alleged "quack" was recorded and photographed in his own home by disguised reporters who then published the results; held, privacy invaded).

415. *Katz v. United States*, 389 U.S. 347 (1967).

416. Those are, respectively, present art. II, § 8, and proposed art. I, §§ 24-25.

417. The commission feared a "later-in-time" construction whereby § 23, having been added to the constitution after the Sunshine Amendment, would be deemed by implication to limit or repeal it. One can imagine such an argument being made if § 23 were added by amendment, although it would be unlikely to succeed. The Sunshine Amendment is a very detailed measure, and it would be difficult to construct a plausible argument for the repeal by implication of any portion of it.

Any merit that a "later-in-time" argument has with regard to amendments disappears entirely with regard to a complete constitutional revision. Obviously, if the commission had wished to repeal or limit the Sunshine Amendment, it was at liberty to do so directly in art. II, § 8. There was no necessity to do so indirectly through the addition of art. I, § 23.

It is virtually certain, however, that the addition of the phrase aided passage of § 23. During the time of the commission deliberations, the appeal in *Plante v. Gonzalez*, 437 F. Supp. 536 (N.D. Fla. 1977), *aff'd*, No. 77-3109 (5th Cir. June 30, 1978), was pending. There was acute, though usually unspoken, awareness that a federal privacy argument was being marshalled against the Sunshine Amendment. The additional phrase merely declared what should already have been clear: that § 23 would have no impact on art. II, § 8.

418. *In re Advisory Opinion to the Governor*, 132 So. 2d 163 (Fla. 1961); *Gray v. Bryant*, 125 So. 2d 846 (Fla. 1960); *State ex rel. McKay v. Keller*, 191 So. 542 (Fla. 1939); *State ex rel. West v. Butler*, 69 So. 771 (Fla. 1915).

419. See section VIB *infra*.

the exclusion, "except as otherwise provided herein." Financial disclosure, open meetings, public records, free speech and press, and unreasonable searches and seizures are all governed by other express provisions of the constitution. Where those sections are implicated, they control.

Second is the question of whether privacy is involved. Does the alleged governmental intrusion invade "private life?" Is there a reasonable expectation of privacy?

Third, does the governmental regulation or action constitute "intrusion"? Or, if one assumes that all governmental regulation or activity is in some sense an intrusion, what showing of public necessity is sufficient to justify it? In short, what standard of review will be used to evaluate alleged intrusions on privacy, and on whom does the burden of proof rest?

In the sections that follow, these questions will be explored. Because of its importance, the standard of review will be considered first. Then follows a consideration of section 23 as applied to various types of activity.

B. The First Priority: A Standard of Review

The most important single issue in the interpretation of the proposed privacy right is a technical one: what standard of review will be applied by Florida courts in construing it? All else depends on the answer to this question. If the Florida Supreme Court adopts a strong standard of review, it will require close judicial scrutiny when individuals seek to protect their privacy from governmental action. It will shift the burden of persuasion to the government. Such a test would ensure a strong and viable right of privacy.

If, on the other hand, the Florida Supreme Court adopts a weak standard of review, or worse, no explicit standard at all, then the right of privacy will be just so much excess baggage in the Florida Constitution. A weak standard of review would mean that the assertion of virtually any governmental interest would override individual privacy rights. The failure to adopt an explicit standard of review would create ad hoc decisionmaking whereby individual judges would decide individual cases on their particular facts through an unarticulated balancing process.

The root of this question lies in our custom, dictated to some extent by necessity, of stating constitutional rights in absolute terms. "The right of the people to privacy is recognized and shall

not be infringed," says the Alaska Constitution.⁴²⁰ But plainly that constitution does not mean what it says. Much governmental action could be said in some sense to infringe privacy, and Alaska voters clearly did not intend to terminate all government. The solution in Alaska, and the custom generally in this country, has been to adopt standards of review by which individual rights and governmental interests are weighed. If the government can sustain a rather stringent burden to demonstrate an important societal need and use of the least intrusive means in achieving the goal, then the governmental activity is permitted to continue.⁴²¹ In the federal courts, a "two-tier" model of analysis has been adopted: the "compelling state interest" test for fundamental rights and suspect classifications, and the lesser "rational basis" requirement for all other constitutional analysis.⁴²²

To be sure, not all the Bill of Rights, nor all state constitutional declarations, are written in absolute terms. The fourth amendment prohibits only "unreasonable searches and seizures," thereby establishing "reasonableness" as the standard of review. The Montana Constitution expresses the standard of review when it states that privacy "shall not be infringed without the showing of a compelling state interest."⁴²³ But in general it has been customary to describe fundamental rights in absolute terms, and therein lies a source of difficulty for modern constitutional revision. The desire for a high degree of certainty about the scope of a fundamental right conflicts with the constitutional imperatives of brevity and flexibility in the statement of general principles.

That this problem is not unique to Florida is evident from a review of constitution revision proceedings in other states. One quickly falls prey to a feeling of *déjà vu*, for many of the Florida commissioners' concerns are mirrored in the proceedings of states such as Montana, Hawaii, Illinois, and Louisiana, and in the general election brochure for California's 1972 privacy amendment.⁴²⁴ In varying degrees the proceedings reveal the same conceptual difficulties.

The heated debate over the wording of the Florida privacy section stems primarily from uncertainty over these basic concepts, and hence over the fundamental question of how Florida courts would

420. ALASKA CONST. art. I, § 22.

421. See *Ravin v. State*, 537 P.2d 494 (Alaska 1975).

422. There is, however, some evidence of a possible federal shift to a "middle tier" approach. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976).

423. MONT. CONST. art. II, § 10.

424. See *Toward a Right of Privacy*, *supra* note 1, at 697-701, 710-11, 713-15, 718-20.

interpret the constitutional privacy right. The effort to insert the word "unwarranted" or "unreasonable" into the privacy section did not stem from opposition to the protection of privacy. Rather, it stemmed from an effort to insert a textual standard of review. The proposed amendments were rejected primarily because they would have anchored the privacy right to the weaker rational basis test. Since the privacy section as adopted contains no textual standard of review, the first task facing Florida courts is to identify the standard to be applied.

While the question is not entirely free from doubt, the available evidence suggests that the Florida Supreme Court would employ the compelling state interest test for the evaluation of governmental actions affecting individual privacy. In so doing, Florida would follow the practice of California, Montana, and the United States Supreme Court. The only state with a strong right of privacy that diverges from this pattern is Alaska, which has adopted its own "means-ends" test as an intermediate form of scrutiny.⁴²⁵ The First District Court of Appeal in *Byron Harless, Schaffer, Reid & Associates, Inc. v. State ex rel. Schellenberg* decided that the Florida Supreme Court would apply the compelling state interest standard.⁴²⁶ Several Florida Supreme Court decisions point to the same conclusion.

For example, the right of privacy was at issue in *Laird v. State*.⁴²⁷ There, the Florida Supreme Court considered a challenge to the possession-of-marijuana law as applied to possession in the home for personal consumption. The court analyzed the federal right of privacy and concluded it did not apply. The court distinguished Alaska's *Ravin v. State*,⁴²⁸ saying *Ravin* rested on a state constitutional provision having no counterpart in Florida. The court continued:

The record before us is simply inadequate to support a determination of whether the health hazards of smoking marijuana justify its proscription to the general public. None of the parties really argued whether the legislature lacks a 'rational basis' for its decision to ban private possession of cannabis. (*Since we have determined that there is no fundamental right to smoke marijuana, the test becomes whether there is a 'rational basis' for outlawing such an activity as opposed to a 'compelling state interest' in the subject matter of the legislation.*) Thus in affirming the trial court, we do

425. *Ravin v. State*, 537 P.2d 494 (Alaska 1975).

426. No. DD-30 (Fla. 1st Dist. Ct. App. June 1, 1978).

427. 342 So. 2d 962 (Fla. 1977).

428. 537 P.2d 494 (Alaska 1975).

not foreclose the possibility of making such a determination on a properly-developed record wherein both sides have had an opportunity to present evidence of competing expert authorities before an impartial tribunal."⁴²⁹

The conclusion seems inescapable that the federal two-tier model is to be used for state, as well as federal, constitutional analysis. If this reading is correct, then the compelling state interest standard would be applied wherever rights of privacy are involved.

While *Byron Harless* did not rely on *Laird*, it did rely on two recent Florida privacy cases. In *Re Grand Jury Investigation (Cobo)* considered privacy in the context of wiretapping.⁴³⁰ The court noted that the Florida wiretap law "is a statutory exception [*sic*] to the constitutional (federal and state) right to privacy. Therefore, as an exception [*sic*] to a constitutional right it must be strictly construed and narrowly limited in application to the uses delineated by the Florida Legislature."⁴³¹ Similarly, in *Hagaman v. Andrews*, the Florida Supreme Court considered a claim by the so-called Governor's Club that legislative efforts to obtain disclosure of its membership infringed associational privacy under the federal and state constitutions.⁴³² The court said:

The interest of the Appellants in their associational privacy having been asserted, we have for decision the question of whether the public interest overbalances conflicting private ones. . . .

We cannot simply assume . . . that every legislative investigation is justified by a public need that overbalances any private rights affected. To do so would be to abrogate the responsibility placed by the Constitution upon the Judiciary to insure that the Legislature does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty, his speech, or assembly

. . . [T]he giving of funds by individuals of wealth and by private associations to enforce some particular law or group of laws, which they single out from the great body of the statutes, is shocking to the law-abiding, public-spirited citizen. This is a subject of

429. 342 So. 2d at 965 (footnotes omitted) (emphasis added).

430. 287 So. 2d 43 (Fla. 1973).

431. *Id.* at 47, cited in *Byron Harless*, slip op. at 24.

432. 232 So. 2d 1 (Fla. 1970). The federal associational privacy claim rested, as is customary, on the first amendment. See, e.g., *NAACP v. Alabama*, 357 U.S. 449 (1958). Interestingly, the state constitutional claim of associational privacy did not rest on the state free speech counterpart, art. I, § 4. Instead, it rested on art. I, § 12, presumably that portion relating to unreasonable interception of private communications.

overriding and compelling state interest which may require legislative prohibition or regulation after an appropriate investigation

. . . .⁴³³

Thus, although there are not many Florida constitutional privacy cases, the cases available point to the compelling state interest standard.⁴³⁴ This is consistent with the intent of the revision commission, which rejected amendments it believed would invite the courts to weaken the constitutional measure. By placing the right of privacy in a separate constitutional section, the commission sought to create a privacy right of equal strength and dignity with other constitutional rights. In taking this approach, the commission was supported by earlier Florida constitutional precedent: "Every particular section of the Declaration of Rights stands on an equal footing with every other section."⁴³⁵

At a minimum, then, the section 23 right of privacy would elicit the same level of scrutiny as that required for other fundamental rights.⁴³⁶ If the Florida Supreme Court chose, as Alaska has done, to articulate its own unique standard of review for fundamental rights, then that standard would need to be applied uniformly, rather than to section 23 alone.⁴³⁷

The foregoing represents a straightforward and conventional constitutional analysis. A word should be said, however, about two other alternatives, both of which are potentially disastrous. One alternative is to hinge constitutional analysis on construction of the word "intrusion." It would be simplicity itself for courts to engage

433. 232 So. 2d at 7-9, *quoted in Byron Harless*, slip op. at 24-25 (emphasis added). While the passage seems to apply the compelling interest standard to federal and state privacy issues, some uncertainty is created because the state privacy issue was raised under art. I, § 12, which is governed by the "reasonableness" standard.

434. This statement must be made with something less than absolute certainty because in each of the cited cases the state constitutional right of privacy was considered in tandem with the federal constitutional right. It is doubtful whether adoption of a differing standard of state constitutional review would have led to a different result in any of those cases. Under the new privacy section, however, the court would have to decide whether the compelling state interest standard—or some other standard—would be followed.

435. *Boynton v. State*, 64 So. 2d 536, 552-53 (Fla. 1953) (en banc).

436. An exception would be required for those cases in which the text of the fundamental right contained its own standard of review, such as art. I, § 12.

437. The case for state independence of approach has been well made in Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). See also Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976).

The proposed constitution adopts this philosophy through a declaration of state constitutional independence. Proposed art. I, § 1 provides in part: "*Rights guaranteed by this constitution are not dependent on those guaranteed by the Constitution of the United States.*" Fla. C.R.C., Rev. Fla. Const. art. I, § 1 (May 11, 1978).

in an unarticulated process of balancing, followed by use of the appropriate label. If the governmental activity in question were deemed socially desirable, the court could simply deem it not to be an "intrusion." But if the activity were deemed improper, it would be condemned as an "intrusion."

The mischief in the labelling approach is that the game can be played without articulating any standards whatsoever. Particular cases could be decided on particular facts, according to the often unspoken assumptions and value judgments of the decisionmakers, in a standardless process of balancing. True, the application of all standards of review involves the weighing of competing social interests. But the crucial point is that the standard of review should reveal, not conceal, the process by which these judgments are made.

This is not to say that the word "intrusion" is without meaning. There is a threshold requirement that government activity intrude, in some commonly understood meaning of the word, on private life, before the right of privacy becomes operative. The language would certainly support the notion that minimal effects on privacy are not an "intrusion" within the meaning of the constitution. But the word "intrusion," without more, does not establish a constitutional standard of review.

Another potentially disastrous approach is analysis by exclusion. The privacy section ends with the phrase "except as otherwise provided herein." This phrase could be taken to have another meaning, apart from its intended purpose of sustaining open government. The phrase could be read to indicate that the right to be let alone is absolute—except when governmental action is authorized by some other constitutional section. Under this approach, one seeks to justify governmental activity by ransacking the constitution for another controlling section. If some other constitutional provision applies, it prevails.

The danger in this approach is twofold. First, such an approach was never intended. There was no systematic review of the constitution to determine whether this novel brand of exegesis would strike the proper balance between individual privacy and vital governmental functions. Such an approach would, in all likelihood, create distorted constitutional analysis and totally unanticipated results. While there was an intention that the privacy section not repeal by implication other constitutional sections, there was no intention that "except as otherwise provided herein" should become the standard of review for constitutional analysis.

Second, an "except as otherwise provided herein" analysis, like the "labelling" approach, is susceptible of great abuse. The constitution contains broad, undefined grants of power to the three

branches of government. Article III, section 1 commits "the legislative power" to the legislature, while article IV, section 1 vests "the supreme executive power" in the Governor, and article V, section 1 places "the judicial power" in the supreme court and named inferior courts. Nowhere are these powers defined.

If, in order to sustain a governmental regulation or activity, it is necessary to find a constitutional source "otherwise provided herein," the analysis then could be made to focus on the content of those broad grants of power. As with the labelling approach, nothing would prevent a process of unarticulated balancing, followed by the announcement that the governmental activity either was, or was not, within the legislative, or executive, or judicial power. The mischief, once again, is that such an approach can be followed without articulation and application of specific standards.

It follows, therefore, that the analytical approach for construction of the right of privacy should be the same analysis that is applied to other fundamental state constitutional rights, rather than a textual interpretation of the privacy section itself. Moreover, that analysis should begin with expression of the relevant standard of review, with clearly stated criteria for guidance of counsel and courts. Once the standard of review is established, all else follows, for courts and counsel are then able to develop a proper record in individual cases and apply the relevant constitutional tests accordingly.

For the remainder of this analysis, the compelling state interest test will be taken as the appropriate standard. That test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the "least intrusive means."⁴³⁸ The latter requirement assures that an otherwise necessary state activity does not sweep too broadly into private affairs.

C. As Applied

The previous sections have outlined general principles of privacy. The question remains: what impact would the new section have on Florida privacy law? The following analysis is designed to answer that question and to identify areas of uncertainty.⁴³⁹

1. The Private Sector

The section 23 right of privacy operates only against government-

438. See, e.g., *Zablocki v. Redhail*, 54 L. Ed. 2d 618, 631-32 (1978); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977); *Roe v. Wade*, 410 U.S. 113, 155 (1973).

439. This section is organized generally to parallel section IV *supra*, relating to the Florida law of privacy.

tal action, not against action by the private sector. This is clear from the language of the section itself and also from the revision commission's proceedings. The private sector will continue to be regulated by statute and by court decision as the tort law of privacy continues to evolve.

a. The Invasion of Privacy Tort

Section 23 would neither expand nor reduce the scope of the existing invasion of privacy tort. The much-debated decision in *Florida Publishing Co. v. Fletcher* would not be affected, for there was no governmental action in that case.⁴⁴⁰

b. The Press

As a part of the private sector, the press would not be affected by the section 23 right of privacy. The tort right of privacy would continue to be applicable to the press.

c. Depositor Records

Section 23 is likely to afford new protection for depositor records when access is sought by governmental agencies or private persons engaged in civil litigation. Section 23 would be applicable to these two special cases because both involve governmental action: the government agency seeks the records directly, or private individuals invoke the aid of a court—a governmental entity—in order to obtain them. The topic is considered in more detail below.

d. Other Statutory Regulations

Existing statutes relating to collection practices, consumer credit, and medical records would endure since these statutes generally regulate private behavior where governmental action is not involved. Similarly, if additional steps are to be taken to protect individual privacy from intrusion by the private sector, action by the legislature or by the courts under the rubric of the invasion of privacy tort will be required.

2. The Right to Know

The revision proposal constitutes a very substantial strengthening of the public right to know. Here the language "except as otherwise provided herein" comes into play, since the public right to know is governed by the provisions relating to public records, open meetings, open judicial proceedings, and financial disclosure.⁴⁴¹

There are several major contributions to the public right to know.

440. 340 So. 2d 914 (Fla. 1976), *cert. denied*, 431 U.S. 930 (1977). The fact that the reporter in that case accompanied the fire marshal onto burned-out premises is of no significance, for he did not enter under color of the fire marshal's authority. Rather, the court ruled, entry was by virtue of the landowner's consent implied through custom and usage.

441. Article I, §§ 24-25, and art. V, §§ 1 & 11 of the proposed constitution, and art. II, § 8 of the present constitution.

First, the revision proposal would cover all three branches of government. At present only the executive branch is undisputedly covered by open government legislation. The legislative branch has consistently argued that it is exempt from the open meetings and public records laws; those laws do not cover the judiciary at all. The revision would clearly include all three.

Second, the revision limits the ability of the legislature and the courts to make exceptions to the general policy of openness. At present the public records and open meetings laws can be amended for any reason the legislature deems sufficient. The judiciary may do likewise through court rulemaking. Under the constitutional revision proposal, records or meetings may be exempted only by rule or general law, and then only "when it is essential to accomplish overriding governmental purposes or to protect privacy interests." If legislative or judicial exceptions did not meet the criteria, they would be void. Thus, for the first time, judicial review of legislative exceptions would be possible.

Third, the basic policy declarations for public records, open meetings, and open judicial proceedings are not subject to modification. At present, public access is guaranteed by statute, which could be changed. Under the revision proposal, the principles of open government would be given constitutional status, thus insulating them from legislative change. The legislature and the judiciary are given limited roles in creating needed exceptions but are not at liberty to repeal the basic principles or make unlimited exceptions.

Fourth, the constitutional revision proposal applies to all existing exemptions; no exemptions have been "grandfathered in." Thus, on the effective dates of the respective sections,⁴⁴² any nonconforming laws would automatically be voided.

With that general outline, somewhat greater detail follows:

a. Public Records

Proposed article I, section 24 would guarantee public access to the records of the executive and legislative branches of government. It would elevate to constitutional status the language of the existing public records law. The commission intended that the existing judicial interpretation of the law be carried forward intact,⁴⁴³ and there is Florida authority for doing so.⁴⁴⁴ However, insertion of the word

442. Proposed art. I, § 24 has a special effective date of June 1, 1979. Present art. II, § 8 remains continuously in effect. The other sections take effect on the general effective date for the revision.

443. See section V *supra*.

444. See, e.g., *Dornau v. State*, 306 So. 2d 167 (Fla. 2d Dist. Ct. App. 1974), *cert. denied*, 422 U.S. 1011 (1975). See generally *Greater Loretta Improvement Ass'n v. State ex rel. Boone*,

“nonjudicial” in section 24 removes all doubt that the legislative branch is covered, for plainly the legislature is included in the phrase, “any nonjudicial public officer or employee.”

Like its companion measures, section 24 permits exceptions to be made by the legislature, but the legislature is limited in two ways. First, exceptions must be made by general law rather than by obscure special laws. Second, exceptions may be made only “when it is essential to accomplish overriding governmental purposes or to protect privacy interests.” The use of the word “essential” suggests that the burden of proof would be on the state to demonstrate the validity of any exceptions.

The use of the phrase “overriding governmental purposes” is used in recognition of the fact that confidentiality sometimes is in the public interest, even though there is no issue of individual privacy. Examples include the confidentiality of civil service examinations and competitive bids prior to bid opening.

The phrase “privacy interests” differs from the language used in the section 23 right of privacy and is intended to be read more broadly. While section 23 is restricted to natural persons, section 24 and the other open government sections contain no such restriction. Thus, if the legislature deemed it desirable, it could continue some of the present exemptions designed to protect what might be called “business privacy.” Examples include the confidentiality of corporate income tax returns and information gathered in connection with economic development or regulation.⁴⁴⁵

Section 24 contains a delayed effective date, which might be characterized as an “action-forcing” provision. Section 24, like its companion provisions, contains no grandfather clause to preserve existing statutory exemptions which violate the new criteria. The proponent of the “action-forcing” provision argued that some of the numerous existing exemptions might not be justified.⁴⁴⁶ Thus, rather than wait for challenges in individual cases, the commission approved a delayed effective date of June 1, 1979, in order to provide both an opportunity and a mandate for legislative review of all existing exemptions. In this sense, the provision is action-forcing. If the legislature failed to assure that existing statutes conform to section 24, there would be a risk of piecemeal invalidation. Thus, if the proposed constitution is ratified, review of existing confidentiality statutes will be a major priority in the 1979 legislature.

234 So. 2d 665 (Fla. 1970); *Hayek v. Lee County*, 231 So. 2d 214 (Fla. 1970); *Ammerman v. Markham*, 222 So. 2d 423 (Fla. 1969).

445. See section IVC(1) *supra*.

446. January 9, 1978 Transcript, *supra* note 3, at 96-97, 99-103.

One area of uncertainty is whether the judiciary would have the power, under the revision, to create exceptions to the public records section. This question involves not only interpretation of section 24, but also its relationship to the section 23 right of privacy.

Section 24 states that the legislature may make exemptions by general law; it does not provide for exemptions from any other source. But the commission debates make it clear that the intention was to elevate the existing public records law to constitutional status, including existing judicial interpretations. It was settled under pre-1975 law that the courts could create public policy exceptions to the public records law, even though the statute contained no express authorization to do so.

Some uncertainty is created, however, because the law was amended in 1975. And the amended statute does not declare that judicial exceptions are forbidden, nor is it plain on the face of the statute that such was the intent.⁴⁴⁷ One district court of appeal has concluded that the legislative history reveals an intention to eliminate judicial power to create exemptions.⁴⁴⁸ On the other hand, the Florida Supreme Court in *News-Press Publishing Co. v. Wisher*, a post-1975 decision, assumed that it did have such power.⁴⁴⁹ It is not clear what weight should be given *Wisher*, for the case arose under pre-1975 law. If the power to create judicial exemptions survived the 1975 amendments, that power would be carried into the constitution when the existing statute is elevated to constitutional status. Conversely, if the district court of appeal is correct, the judicial exemption power did not survive. The question must be regarded as an open one.

There is another line of inquiry: whether sections 23 and 24 themselves reflect an intent to grant or deny the judiciary the power to create judicial exemptions. Section 24 provides: "*The legislature may exempt records by general law when it is essential to accomplish overriding governmental purposes or to protect privacy*

447. The pre-1975 version provided: "All public records which presently are deemed by law to be confidential or which are prohibited from being inspected by the public, whether provided by general or special acts of the legislature or which may hereafter be so provided, shall be exempt from the provisions of this section." Act of May 31, 1967, ch. 67-125, § 7, 1967 Fla. Laws 257.

The 1975 version provided: "All public records which presently are provided by law to be confidential or which are prohibited from being inspected by the public, whether by general or special law, shall be exempt from the provisions of subsection (1)." Act of June 27, 1975, ch. 75-225, § 4, 1975 Fla. Laws 638.

448. *State ex rel. Veale v. City of Boca Raton*, 353 So. 2d 1194 (Fla. 4th Dist. Ct. App. 1977).

449. 345 So. 2d 646 (Fla. 1977).

interests.”⁴⁵⁰ This sentence can be read to make the legislature the sole source of exemptions, or it can be read simply to impose a limitation on legislative power. The existing statute makes records exempt “which presently are provided by law to be confidential or which are prohibited from being inspected by the public, whether by general or special law”⁴⁵¹ The existing statute allows exemptions by general or special law for any purpose which the legislature deems appropriate. Section 24 limits legislative power to general laws and to the categories of “overriding governmental purposes” and “privacy interests.” Under the latter reading, the second sentence in section 24 was intended as a limitation on legislative power but was not intended as a limitation on judicial power to create exemptions.

The Constitution Revision Commission proceedings are not enlightening on this point. The author raised the question briefly as part of a discussion before the Ethics, Privacy and Elections Committee,⁴⁵² but the point was never addressed by the committee or the commission as a whole.

The question becomes significant when sections 23 and 24 interact. In the usual case, the legislature will have conferred confidentiality on private information collected by public agencies. Certainly most of the existing exemptions from the public records law were enacted to protect individual privacy.⁴⁵³

But suppose the legislature has not acted. To pose one actual example, several years ago the Florida Division of Youth Services, the state juvenile correctional agency, operated under authority of chapter 959, Florida Statutes, which had been comprehensively revised in the 1969 legislative session.⁴⁵⁴ Purely through oversight, no one thought to insert a provision on confidentiality of records. Thus, individual case files, which contained psychological and psychiatric information, as well as the most intimate information about home and family life, were public records, though the agency blissfully continued its longstanding practice of treating the records as highly confidential. When the true situation was discovered, the agency secured corrective legislation.⁴⁵⁵

Fortunately, in the example given, no one sought general access to peruse case files at will. If someone had done so, judicial relief

450. Fla. C.R.C., Rev. Fla. Const. art. I, § 24 (May 11, 1978).

451. FLA. STAT. § 119.07(2)(a) (1977).

452. October 14 Minutes, *supra* note 306, at 3.

453. See section IVC(1) *supra*.

454. Ch. 69-365, 1969 Fla. Laws 1279.

455. Ch. 72-179, 1972 Fla. Laws 559.

could have been sought. The records in question were a logical subject for a judicially created exemption.⁴⁵⁶ But assume that the same scenario occurred under the proposed constitutional revision. Would the judiciary have the power to make particular records confidential in order to protect individual privacy? Or, phrased differently, would the judiciary have the power to protect the privacy of records when the legislature had failed to do so?

The question admits of no easy answer. Of course, if it is determined that the power to create judicial exceptions was imported into section 24 from the statute, then a judicial remedy is possible. But the more fundamental question is whether the constitutional scheme permits or demands judicial action. At issue is the vexing question of how to strike the balance between the individual right of privacy and the public right to know.

One answer would be as follows: Section 23 declares the right to be let alone and free from governmental intrusion into one's private life. That is a fundamental right, which can be infringed only in order to accomplish a compelling state interest. In the example given, surely there is a compelling state interest in the operation of the juvenile correctional system which, of necessity, must collect highly personal information. But, in infringing the fundamental right of privacy, the government must also use the least intrusive means. In the example given, it is this aspect of the test that the government fails. The least intrusive means are not employed when private information is placed in public files, absent good reason for doing so. In the example given, no reason exists for public disclosure of individual case files.⁴⁵⁷

Under this analysis, the statutory scheme violates the section 23 right of privacy. The question then becomes one of what remedy to use. One possibility is to declare the individual case files, or sensitive portions thereof, confidential. Some other possibilities are considered in the next section, including expungement, return of the records to the individual citizen, or an injunction against collecting private information in the first place. In the example given, the latter possibilities seem unsuitable. Plainly, the most effective remedy would be the creation of a judicial exemption.

The question may be put another way. Suppose the legislature

456. In the example given, some of the records probably would have qualified for exemption as medical records or juvenile court records. See *FLA. STAT.* §§ 39.12, 458.16 (1977). Even so, the majority of each case file, including the majority of the clearly private information, would not have fit within existing exemptions.

457. This discussion applies only to individual case files. All other records pertaining to the agency operations are open to public inspection.

chose to repeal all exemptions in section 24. Thus, every public record of whatever description, from tax returns to mental hospital case histories, would be open to inspection. Would the courts then have the power to declare private information confidential? Or is the legislature's unreviewed judgment under section 24 dispositive?

Sections 23 and 24 should be read together to give harmonious effect to the whole of the constitution. Section 23 confers a right to be let alone. Section 24 declares the right to know and places primary responsibility in the legislature to protect individual privacy and overriding governmental purposes. But where the legislature has failed to act, yet privacy is clearly and unnecessarily infringed, the judiciary retains power under section 23 to declare records confidential. Under this view, the second sentence of section 24 should be read as a limitation on the power of the legislature rather than as an intention to exclude judicial exemptions. This approach would allow vital governmental functions to continue without the necessity of declaring an entire statutory scheme unconstitutional, an alternative to be considered later.

This question is highly debatable. A very respectable argument can be made that only the legislature may create exemptions under section 24. With this view, whatever is placed in government files is public, absent a general law creating an exemption. If this view is taken, the section 23 right of privacy comes into play in the crucial preliminary question of what information is placed in government files in the first instance.

b. Open Meetings

The foregoing analysis applies in almost identical fashion to article I, section 25, relating to open meetings. The primary difference is that section 25 carries no delayed effective date. Thus, on the general effective date for the constitutional revision, section 25 would be fully applicable. At that time, existing exemptions from the general policy of public access would need to meet the constitutional criteria of being "essential to accomplish overriding governmental purposes or to protect privacy interests." Any exemptions not meeting the test would be void.

c. Open Judicial Proceedings

The preceding observations substantially apply to proposed article V, sections 1 and 11, relating to the judicial branch. The constitutional right of access extends to judicial hearings and records, thus excluding conferences of appellate judges. The proposal expressly exempts grand and petit jury proceedings from public access. The proceedings and records of judicial agencies are, like executive branch agencies, open unless made confidential. The Judicial Qualifications Commission continues to be regulated by article V,

section 12, providing for confidentiality up to the point of finding probable cause and filing charges.

Article V, section 1 allows for exemptions by supreme court rule or general law; section 11, relating to the judicial nominating commissions, allows for exemptions by supreme court rule only. Like the other open government provisions, sections 1 and 11 restrict exemptions to those "essential to accomplish overriding governmental purposes or to protect privacy interests." This represents a reduction in judicial discretion in this area. Presently, Florida courts maintain that they have inherent power to regulate their proceedings, including the power to close hearings and records. Under the proposed revision, section 1 restricts judicial discretion in two ways. First, exemptions can be made only if they meet the constitutional criteria. Second, judicial exemptions must be made by supreme court rule. Thus, trial judges would need to act pursuant to a rule or statute before closing a hearing or record.

The proposal also would increase the legislative role in the process. The legislature is expressly authorized to enact statutes on the subject. At present, some statutes, such as those relating to closure of hearings in adoption cases, have been honored by the courts. But others, such as those relating to expungement of arrest records, have been invalidated as infringing on the inherent power of the courts to supervise their own proceedings.⁴⁵⁸ Under the revision commission's proposal, such legislative enactments would be valid.

The legislative role also would be increased because of the requirement in section 1 that exemptions be made by supreme court rule or general law. Since article V, section 2(a) provides for repeal of a supreme court rule by two-thirds vote of the legislature, judicial exemptions would be made subject to a "check and balance" in the legislature.

d. Financial Disclosure; Public Officials Generally

Financial disclosure will continue to be regulated by the Sunshine Amendment, article II, section 8, which would be renumbered as section 7 in the proposed constitution. Like the other open government measures, the Sunshine Amendment provides a legislative role, for the meaning of the constitutional phrase "full and public disclosure" of financial interests is subject to definition and modification by the legislature. The section 23 right of privacy would have no impact on the Sunshine Amendment.

In addition to financial disclosure, recent controversy has surrounded the question of closure of divorce proceedings of public

458. See section IVD(2) *supra*.

officials or public figures.⁴⁵⁹ Under the proposed revision, those questions would be dealt with in the framework of article V, section 1. There would need to be either a legislative enactment or a rule authorizing closure; otherwise the proceeding would be open.

3. *Privacy and Governmental Snooping*

The previous sections assumed that information has been collected by the government for a legitimate purpose and that the information collected is reasonably necessary for that purpose. The proposed constitutional revision contemplates that such information will be made public unless proper action is taken to make it confidential.

But two questions arise. First is the question of whether government may gather information which is not needed for a legitimate governmental purpose. The answer seems clear. If the section 23 right of privacy means anything, it must mean that government cannot compile dossiers on citizens without justification, engage in unauthorized surveillance, or collect private information unnecessarily for placement in agency files, whether or not open to the public.

One example of such intrusion was examined in *White v. Davis*, a California privacy case.⁴⁶⁰ There it was alleged that police officers had posed as university students, enrolled in classes, compiled intelligence reports about class discussions, and then turned the reports over to the police department. The California Supreme Court had no difficulty concluding that such a complaint made out a prima facie violation of the state constitutional right of privacy. During the Florida Constitution Revision Commission deliberations, Commissioner Lew Brantley focused on this type of threat to privacy, citing a senate investigation of information-gathering practices in a Florida law enforcement agency.⁴⁶¹

Another example of intrusive information gathering is *Byron Harless*.⁴⁶² Although the First District Court of Appeal endorsed the use of the psychological screening methods at issue there, it is difficult to imagine a greater or more improper intrusion of privacy. Not only was the information of the most personal kind, but it had no arguable relevance to the applicant's ability to manage a major

459. See sections IVC(3) and IVD(3) *supra*.

460. 533 P.2d 222 (Cal. 1975).

461. January 9, 1978 Transcript, *supra* note 3, at 54-60.

462. *Byron Harless, Schaffer, Reid & Assocs., Inc. v. State ex rel. Schellenberg*, No. DD-30 (Fla. 1st Dist. Ct. App. June 1, 1978); see section IVF(3) *supra*.

electric utility. Plainly the section 23 right to be let alone should prevent this type of inquiry as a condition for public employment.

One result of adoption of section 23 should be the imposition of limits on the authority of the government to extract personal information. Information sought should be reasonably necessary to a legitimate government purpose, and the burden of demonstrating necessity should be on the agency. Personal information should not be sought if some less intrusive alternative would suffice.

If an agency seeks private information improperly, the appropriate remedy would be injunctive in nature. If, as in *Byron Harless*, the agency had already collected the information, the remedy would be either complete expungement or return of all records to the individual. Certainly it would be proper to make interim arrangements to preserve confidentiality during the pendency of the litigation, such as delivery of the documents to the clerk of the court to be kept in sealed files. It would not be proper, however, to reach the *Byron Harless* result, that is, to permit the agency to retain unnecessarily intrusive information but order that the files be nonpublic. The retention and use of such information would violate the right of privacy even if kept in confidential files.

The second question which arises has been explored to some extent in an earlier section. Assume that a government agency seeks private information for which there is a legitimate public purpose and for which there is no alternative. Assume further that the agency is acting pursuant to statutory authority but that the legislature has not made the information confidential. In an earlier section, we considered whether this information could be made confidential once placed in government files. But could production of this information be resisted under section 23 on the ground that the government may not compel production of highly private information without making suitable arrangements for confidentiality?

Consider a variation on *Whalen v. Roe*.⁴⁶³ Suppose the legislature enacted a statute requiring pharmacists to file with a state agency a copy of each prescription for an addictive drug for entry into a central computer bank. The avowed purpose is to detect illicit drug sales and use, a legitimate state purpose. Suppose that, unlike *Whalen*, the records are to be entered in public files, with no provision for confidentiality. Could the pharmacists and patients block collection of the information on the theory that it infringed individual privacy?

463. 429 U.S. 589 (1977).

This writer's answer would be in the affirmative. The government may intrude on privacy in order to accomplish a compelling state interest, and here the interest in enforcing the criminal law could be deemed compelling. But the government must also use the least intrusive means in infringing a fundamental right, and it is this aspect of the test that the government would fail. The collection of highly sensitive medical information is not accomplished by the least intrusive means when it is placed in a central data bank accessible to the general public.

The question then becomes one of remedy. One alternative is to declare confidential those records which, if unnecessarily disclosed, would invade privacy. Whether this remedy is available depends on the interpretation given section 24.⁴⁶⁴

But even if that remedy is not possible, several other alternatives are available. If the statutory scheme is unconstitutional and the courts are unable to save it by declaring the necessary records confidential, it follows that the entire statutory scheme is void. The government may not collect new information and must return that information it has already obtained. The remedies would be in the nature of injunction or prohibition, as well as expungement or return of property.

The government would then have a choice. It could abandon its plans altogether, or it could reenact the statutory scheme with suitable provisions for protection of the section 23 right of privacy. In essence, section 23 establishes a quid pro quo. The government may intrude on privacy to accomplish a compelling state interest—but only if it minimizes the intrusion through confidentiality arrangements to protect individual privacy.

The rule would naturally be otherwise if public disclosure were essential to effectuate the statutory scheme. An obvious example is financial disclosure for public officials. Even in the absence of a constitutional measure like the Sunshine Amendment, there is arguably a compelling state interest in financial disclosure.⁴⁶⁵ In order to achieve its purpose, financial disclosure must be public. Disclosure into confidential files would not suffice since the purpose of disclosure is to permit the public to detect and evaluate actual or potential conflicts of interest.

A further example may be considered. In the scenario considered above, a public agency seeks to place private information in public files when it is not necessary to do so. However, it is also possible

464. See section VIC(2)(a) *supra*.

465. See *Goldtrap v. Askew*, 334 So. 2d 20 (Fla. 1976); section IVC(3) *supra*.

that a public agency would place private information in confidential files but allow unnecessarily broad access to the supposedly restricted files. This was the situation in *Merriken v. Cressman*, in which a school district had administered psychological questionnaires to all eighth graders in an attempt to identify potential drug abusers.⁴⁶⁶ The results were to be placed in a massive data bank, easily accessible to a wide variety of personnel throughout the school system. The federal district court concluded that the project invaded the right of privacy. It seems plain that the section 23 right of privacy would apply to cases such as *Merriken*. This, once again, would offend the "least intrusive means" aspect of the compelling state interest test.

One final question may be considered. Suppose in *Merriken* stringent security precautions had been taken. Would the collection of such data nonetheless violate the right of privacy? The answer to the question depends, once again, on application of the compelling state interest test. While the state may have a compelling interest in the prevention of drug abuse, it does not follow that all things done for that purpose are permissible. In the example given, constructing a psychological profile of every eighth grader in the school district, labelling some with the undefined term "potential drug abuser," and referring them to compulsory treatment programs, must be considered an astonishing and massive intrusion on privacy. Plainly there is not a compelling state interest in the implementation of such a program. Alternatively, the means chosen can hardly be deemed the least intrusive way to achieve the permissible goal of preventing drug abuse. Erecting a shield of confidentiality should not save governmental information-gathering when there is no sufficient reason for the government to collect the information.

4. *Privacy in the Judicial Process*

The constitutional revision proposal would have a definite impact on several aspects of privacy in the judicial system.

a. *Discovery*

As suggested earlier, there is great concern over access to individual depositor records in banks and other financial institutions.⁴⁶⁷ The United States Supreme Court has taken the view that depositor records are business records of the bank. Thus, an agency or a civil litigant may obtain access directly from the bank, without notification to the depositor or opportunity for the depositor to intervene or object.

466. 364 F. Supp. 913 (E.D. Pa. 1973); see *Toward A Right of Privacy*, *supra* note 1, at 640-42.

467. See sections IVB(3), VIC(1)(c) *supra*.

California's constitutional right of privacy has brought about a change in that rule as a matter of state constitutional law. In *Valley Bank v. Superior Court*, the California Supreme Court held that the right of privacy protects one's confidential financial affairs.⁴⁶⁸ The court balanced the civil litigant's need for discovery against the right of privacy and concluded that neither could prevail absolutely. Rather, when customer information is sought, "the bank must take reasonable steps to notify its customer . . . and to afford the customer a fair opportunity to assert his interests"⁴⁶⁹ Protective orders could be fashioned where necessary to protect the privacy of records ordered to be disclosed. The California Supreme Court reached a similar result regarding criminal investigations with its interpretation of the state search-and-seizure clause.⁴⁷⁰

The section 23 right of privacy should produce similar applications in Florida. This would provide greater privacy in banking records than now exists but would not create an absolute barrier to civil discovery or agency investigations. The issue arises when discovery is sought from third persons who are not parties or when an agency is in the investigation phase prior to commencing proceedings. When litigation is under way, the parties would have notice of discovery requests and would have an opportunity to defend their interests.

b. *Sealing or expungement of records*

The constitutional revision proposal would affect the sealing or expungement of records in two ways. First, article V would limit the circumstances under which records could be made confidential. In order to seal or expunge records, trial courts would need to act pursuant to supreme court rule or general law designed to protect privacy interests or accomplish overriding governmental purposes. Presumably the supreme court or the legislature would respond to the constitutional revision by articulating specific criteria for invoking confidentiality. Litigation to date has produced no clear set of rules, and no consensus has emerged on the circumstances under which court records could be sealed purely to protect privacy. There is some irony in the priorities of a judicial system which has long observed confidentiality to protect financial interests—trade secrets—but which has been reluctant to believe that privacy itself is worthy of protection. Although the constitutional revision would not mandate any particular rules, it would require the supreme court to

468. 542 P.2d 977 (Cal. 1975).

469. *Id.* at 980.

470. *Burrows v. Superior Court*, 529 P.2d 590 (Cal. 1974).

promulgate a clear set of standards, thus producing more certainty than presently exists.

The second effect would be an increase in the legislative power to act in this area. The Florida Supreme Court held in *Johnson v. State* that expungement of arrest records is a judicial function, thus invalidating a statute on the subject.⁴⁷¹ The proposed article V, section 1 would reverse that decision. The constitutional revision would expressly authorize the legislature to act by general law, and the supreme court to act by rulemaking, to protect privacy or overriding governmental purposes.

c. The Power to Close Judicial Proceedings

The pattern would be the same as that discussed above.

d. Financial Disclosure and Open Meetings

Financial disclosure for judges would continue to be regulated by the Sunshine Amendment and the Code of Judicial Conduct. The judicial nominating commissions would be governed by a uniform set of rules, and the Judicial Qualifications Commission would continue to operate as it does now.

5. Privacy and Autonomy: The Right to Decide

One important aspect of the right of privacy is the right to make important decisions about one's own life. It is in this area that the effect of the proposed right of privacy is difficult to predict.

a. The Griswold Constellation

The federal right of privacy protects the right to make fundamentally important decisions relating to the family, including marriage, contraception, procreation, abortion, childrearing, and education. In this area the federal privacy right is controlling.⁴⁷²

b. Helmets, Hair, and Neckties

Florida courts have upheld against privacy challenges a statute requiring motorcyclists to wear helmets and a requirement that an attorney wear a necktie in court.⁴⁷³ On the other hand, privacy has been invoked successfully to invalidate a school's regulation of hair length.

Of these decisions, the only one that seems vulnerable under the section 23 right of privacy is the necktie case, and that primarily because the district court of appeal decisions were so poorly reasoned. Plainly there is an important interest in maintaining deco-

471. 336 So. 2d 93 (Fla. 1976).

472. It is, of course, theoretically possible that the state right of privacy would have some effect in this area. But the point has no significance. Few state regulations in this area have withstood federal privacy challenges. As a practical matter, the field is so thoroughly preempted that nothing remains on which a state privacy right could operate.

473. See section IVE(2) *supra*.

rum in the courts, but the real issue is one of least intrusive means. Since the attorney in that case had argued in many courts, including the Florida Supreme Court, without a necktie, preservation of order in Florida courts apparently does not depend on that particular regulation.

c. *Marijuana*

The Constitution Revision Commission discussed the marijuana issue at some length.⁴⁷⁴ The commission itself was uncertain whether the proposed right of privacy would limit the power of the state to regulate possession of marijuana for personal use in the home, though Commissioner Dexter Douglass offered the personal opinion that it would not. As Douglass pointed out, state court decisions go both ways.⁴⁷⁵

This writer must leave the question open and can only suggest some of the relevant considerations. Of the ten states with a state constitutional right of privacy, four have had state supreme court decisions on the subject: Alaska, Hawaii, Arizona, and Florida. After reviewing the scientific evidence, Alaska found that the state did not have a sufficient interest in prohibiting possession for personal use in the home. Possession outside the home could be prohibited, as could possession in the home of quantities large enough to indicate intent to sell. The Alaska court made two crucial assumptions. First, the court assumed that the home deserves a higher degree of protection than other places. Thus, intrusions into the home would be severely scrutinized. Second, the court reasoned that although possession and sale of marijuana in the community at large could be proscribed, there was not sufficient justification for intrusion into the home.⁴⁷⁶

The Hawaii Supreme Court reached the opposite result. Like the court in Alaska, the Hawaii court made two crucial assumptions which ultimately determined the outcome of the case. First, the Hawaii court assumed that its right of privacy was a weak one, unlike Alaska's strong privacy right. Thus, the Hawaii possession-of-marijuana law would need only to meet a relatively weak showing of necessity. Second, the Hawaii court assumed that the state could properly prohibit private possession in the home as part of a scheme to control possession and sale in the community at large. Thus, the home apparently did not occupy the same place of special import-

474. See section VC *supra*.

475. See notes 356-57 and accompanying text *supra*.

476. See *Ravin v. State*, 537 P.2d 494 (Alaska 1975); *Toward a Right of Privacy*, *supra* note 1, at 694-95.

ance in Hawaii that it did in Alaska.⁴⁷⁷

The Arizona Supreme Court likewise decided that prohibition of possession of marijuana in the home did not violate the right of privacy.⁴⁷⁸ Its decision is unilluminating since it rested primarily on an analysis of federal privacy cases. The Arizona right of privacy has consistently been held to be the functional equivalent of the fourth amendment, and it is used exclusively to regulate searches and seizures. Thus, the state privacy section was involved only to determine what level of scrutiny would be applied to determine the reasonableness of a search of a private residence. Since the Arizona privacy section has never been construed to create a general right of privacy, the Arizona analysis is inapplicable to the proposed Florida privacy right.

Florida decisions are likewise inapplicable since Florida's present privacy provision merely protects "private communications." In *Laird v. State*, the Florida Supreme Court indicated that the relevant inquiry at the present time is whether there is a rational basis for the proscription of marijuana possession in the home.⁴⁷⁹ Given the regularity with which marijuana cases arise, if section 23 is ratified it seems likely that the courts would soon be called on to consider the issue.

When that issue is raised, how might the Florida courts decide? Only a general suggestion can be made. As in Alaska and Hawaii, the outcome would depend primarily on the strength of the privacy right and on the assumptions which the court makes. To begin with, as the court suggested in *Laird*, a properly developed record containing scientific evidence of the effects of marijuana use would be needed. Only with such evidence could the court evaluate whether there is a compelling state interest in proscription of marijuana use generally or in places outside the home. The compelling state interest test would be applied rather than the weaker rational basis test, since Florida's proposal is for a strong, freestanding right of privacy.

The court would also need to compare the dangers of marijuana use in the home against the intrusion involved in prohibiting possession there. Here, too, the court's assumptions would be important. Alaska assumed that the home is deserving of more protection than other places and thus subjected the law to its closest scrutiny as applied to possession in the home. Hawaii took a contrary view. Plainly Florida's proposed right of privacy is not restricted to the

477. See *State v. Baker*, 535 P.2d 1394 (Hawaii 1975); *Toward a Right of Privacy*, *supra* note 1, at 711.

478. *State v. Murphy*, 570 P.2d 1070 (Ariz. 1977).

479. 342 So. 2d 962 (Fla. 1977).

home, but the courts could well take the view that the home is a place of special importance.

Even if the Florida courts concluded that there was no compelling state interest in prohibiting possession of marijuana in the home, the inquiry would not be over. A second question is whether there is a compelling interest in prohibiting marijuana possession in places outside the home. Assuming an affirmative answer to that question, the inquiry is whether the state may prohibit possession in the home as an incident to an overall scheme to prohibit possession in the community at large. It is here also that the Alaska and Hawaii assumptions diverge. If the Florida court took the Alaska view, possession in the home could not be prohibited; if it took the Hawaii view, it could.

This writer has no knowledge of what the scientific evidence would show and is unable to predict what assumptions the Florida Supreme Court might make in the analysis outlined above. As Commissioner Douglass put it, "There is no assurance of what our court would hold. I have to say that."⁴⁸⁰

d. *Sexual Behavior*

Most of the considerations outlined above also apply to laws regulating consensual sexual behavior between adults in the home. It is difficult to locate cases relating to purely private sexual behavior. Most litigated matters have wound up in court because the sexual behavior was done in a public place or involved third persons, the use of force, or photographs.⁴⁸¹ While some reported cases involve surveillance of public restroom stalls,⁴⁸² law enforcement agencies apparently have not yet sought to install electronic surveillance devices in private homes in order to regulate sexual practices.

It is this latter possibility that should cause some concern. If the state has the power to regulate purely private behavior of this type, there would appear to be no reason why a law enforcement agency could not apply for a warrant to conduct such surveillance. Surely it would be little consolation for the average citizen to learn that surveillance showed he had been wrongly accused. Thus, one fundamental inquiry is to identify what sorts of intrusion into homes would be permitted.⁴⁸³

480. See section VC(1) & note 358 *supra*.

481. See, e.g., *State v. Bateman*, 547 P.2d 6 (Ariz.) (en banc), cert. denied, 429 U.S. 864 (1976); see section IVE(4) *supra*.

482. See, e.g., *Moore v. State*, 355 So. 2d 1219 (Fla. 1st Dist. Ct. App. 1978).

483. An alternative way to deal with this type of surveillance is to hold it to be an inherently unreasonable search and seizure under the search and seizure clause. See *Toward a Right of Privacy*, *supra* note 1, at 733-35 n.503.

The question may very well be posed at some future date in a Bar admission case. The Florida Supreme Court has recently held that a homosexual preference, without more, is not ground for excluding an otherwise qualified applicant from the Bar.⁴⁸⁴ The court reserved the question of whether evidence of homosexual acts would require a contrary result, but it refused to remand to develop a record in that case. It seems likely that some future case will pose the issue directly.

As with the marijuana issue, it is difficult to predict what result would be reached. Alaska has suggested, without deciding, that the right of privacy prohibits regulation of purely private consensual sexual behavior between adults, but not otherwise.⁴⁸⁵ Arizona has held precisely the opposite, though its analysis relied on the federal right of privacy.⁴⁸⁶

Under Florida's proposed right of privacy, the courts would be called on to determine if such regulations, as applied to conduct in the home, serve a compelling state interest and, if so, whether that interest is accomplished by the least intrusive means. As with the marijuana issue, whether the court assumed that the home is a special place worthy of special protection would be important to the outcome of the case.

6. *The Proposed Right of Privacy and Florida's Existing Constitutional Privacy Decisions*

Florida's present constitution protects privacy through the prohibition of unreasonable searches, seizures, and interceptions of private communications. Additionally, one district court of appeal has recognized a state constitutional right of privacy. Thus, the question arises whether ratification of section 23 would have any impact on present state constitutional privacy law.

a. *Unreasonable Searches and Seizures*

The proposed revision carries forward intact article I, section 12, relating to unreasonable searches and seizures. Under conventional doctrine, the coverage of that section would remain intact, including those court decisions construing it. The section 23 right of privacy would not have the effect of modifying a coequal constitutional provision. Thus, the present criteria for searches and seizures would continue to be applied as they have in the past, and the ability to investigate crime and obtain search warrants would continue unimpaired. This view is supported not only by the proceedings of the

484. Florida Bd. of Bar Examiners *Re: Eimers*, 358 So. 2d 7 (Fla. 1978).

485. *Anderson v. State*, 562 P.2d 351, 358 (Alaska 1977).

486. *State v. Bateman*, 547 P.2d 6 (Ariz.) (en banc), cert. denied, 429 U.S. 864 (1976).

revision commission but, more importantly, by principles of constitutional construction and the plain language of section 23 itself. Plainly, searches and seizures are regulated by section 12, so the provision of section 23, "except as otherwise provided herein," comes into play.

b. Unreasonable Interception of Private Communications

The same is true of the section 12 prohibition of unreasonable interception of private communications. Again, the commissioners made it clear that electronic surveillance would continue to be regulated by the existing section 12, as it had in the past. Accordingly, section 12 was carried forward intact. This, too, is an area "otherwise provided herein."

It should be noted that the pace of technological change enhances the importance of privacy and legal mechanisms to protect it, whether it be through a freestanding privacy section such as article I, section 23, or through an unreasonable search, seizure, and interception provision such as section 12. There has been a tendency historically to give the search and seizure section a purely procedural meaning. That is, absent exigent circumstances, a search, seizure, or interception is considered reasonable if done with a warrant, and unreasonable if done without. But section 12 creates a right to be free from *unreasonable* searches and seizures, an evaluation which has a substantive as well as procedural aspect. To be sure, the standards for sections 12 and 23 are very different, and the "reasonableness" criterion for section 12 is considerably less stringent than the compelling state interest test for section 23. But the common feature of the two is that both may impose, at some point, substantive limitations on the power of government to intrude on privacy.

c. The Byron Harless Decision: The State Constitutional Right of Privacy

The *Byron Harless* court discovered a state constitutional right of privacy in the due process clause of the present Florida Constitution.⁴⁸⁷ The question is: what impact would ratification of section 23 have on that decision? The answer was suggested earlier. Section 23 would make explicit the right of privacy that *Byron Harless* found implicit in the liberty protected by the present constitution. Thus, ratification would simply confirm or underscore that holding of the *Byron Harless* decision.

It is possible, however, that section 23 would modify the *Byron*

487. *Byron Harless, Schaffer, Reid & Assocs., Inc. v. State ex rel. Schellenberg*, No. DD-30 (Fla. 1st Dist. Ct. App. June 1, 1978).

Harless analysis in certain respects. Section 23 emphasizes one's right to be free from governmental intrusion into his private life. This writer has already suggested that the collection of psychological interviewing information was the fundamental evil in *Byron Harless*. The problem of confidentiality of records was purely secondary since the information never should have been collected. The language of section 23 should make this clear. If it does, *Byron Harless* would be modified at least to that extent.

d. The Police Power and the Taxing Power

One critic of the right of privacy suggested that it could undermine the ability of the state to govern through the police power and the taxing power.⁴⁸⁸ There is no basis at all for this concern since the taxing power of the state exists through express constitutional provision which would not be undercut by a coequal right of privacy. Insofar as tax matters are concerned, they would qualify under the rubric of "as otherwise provided herein."

The police power, which has its origin in the sovereignty of the state and, by implication, in the state constitution, would likewise remain viable. The only limitations on the power of the state would be those described earlier in this article. Essentially, the police power would not extend so far as to allow governmental intrusion into one's private life. This in no way describes a complete immunity from governmental regulation, but rather prevents intrusion absent a compelling state interest and use of the least intrusive means. This has been the result in states that have already adopted a constitutional privacy section. The Privacy Protection Study Commission, in reviewing California's experience, found that the right of privacy did "not appear to have levied an undue burden on State government or private organizations."⁴⁸⁹

VII. CONCLUSION

Fifty years ago, Justice Brandeis wrote:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.⁴⁹⁰

488. See section I & note 3 *supra*.

489. PRIVACY LAW IN THE STATES, *supra* note 5, at i.

490. *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

Brandeis penned this famous passage while writing of the fourth amendment. In the intervening decades, technology has advanced beyond belief, government has grown much larger, the population has become more densely concentrated than ever, and society has become more complex and interdependent. The fourth amendment was adequate for the technology of 1791, and it has adapted nicely to many technological developments since that time.

Unfortunately, it is not adequate today. Modern conditions demand reexamination of the relationship between the individual and his government. If a free society is to remain free, there must be a physical and psychological zone of liberty for each citizen. The proposed constitutional revision makes a major contribution to this enterprise by recognizing each individual's inalienable and fundamental right of privacy.

VIII. APPENDIX

The current versions of the state constitutional privacy provisions are given here. The dates are those on which the right of privacy was added, and not necessarily the date of the last revision of the indicated section.

ALAS. CONST. art. I, § 22:

Section 22. Right of Privacy.—The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

Adopted by amendment, 1972.

ARIZ. CONST. art. II, § 8:

Section 8. Right to privacy.—No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Constitution adopted, 1910.

CAL. CONST. art. I, § 1:

Section 1. Inalienable Rights.—All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

Adopted by amendment, 1972.

FLA. CONST. art. I, § 12:

Section 12. Searches and seizures.—The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. Articles or information obtained in violation of this right shall not be admissible in evidence.

Constitution adopted, 1968.

HAWAII CONST. art. I, § 5:

Section 5. Searches, Seizures and Invasion of Privacy.—The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures, and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.

Constitution adopted, 1968.

ILL. CONST. art. I, §§ 6, 12:

Section 6. Searches, Seizures, Privacy and Interceptions.—The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

Section 12. Right to Remedy and Justice.—Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.

Constitution adopted, 1970.

LA. CONST. art. I, § 5:

Section 5. Right to Privacy.—Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched,

the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.

Constitution adopted, 1974.

MONT. CONST. art. II, §§ 9, 10:

Section 9. Right to know.—No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Section 10. Right of privacy.—The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

Constitution adopted, 1972.

S.C. CONST. art. I, § 10:

Section 10. Searches and seizures; invasions of privacy.—The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.

Adopted by amendment, 1971.

WASH. CONST. art. I, § 7:

Section 7. Invasion of Private Affairs or Home Prohibited.—No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Constitution adopted, 1889.

